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Question of Gubernatorial Immunity

An interesting question of a Governor's immunity from arrest and prosecution during his term of office, even on indictments charging offenses alleged to have been committed before he assumed the position, is presented in the proceedings which have been instituted against Governor Len Small, of Illinois. The Sangamon county grand jury on July 20 returned indictments charging the Governor, who was formerly state treasurer, with embezzling $500,000 of State funds, conspiring to defraud the state of $2,000,000, and embezzling, jointly with Lieutenant Governor Sterling, also a former state treasurer, and one Vernon Curtis, $700,000 of interest on public funds. The basis of the indictments is the charge that state funds were unlawfully lent and that the greater part of the interest thereon was withheld.

When the indictments were returned Governor Small assumed the position that he could not be arrested against his will during his term of office and that to submit voluntarily to arrest would be to interfere with his functions as chief executive and thereby violate his oath of office. Circuit Judge Smith, of Sangamon County, declined to adopt this view and announced that it was the duty of the clerk to issue the process of capias and of the sheriff to serve the same. After considerable delay, and even some talk of the right of the Governor to order out the militia to protect the executive department against judicial "usurpation," Governor Small finally submitted to arrest at Springfield and gave bond, recording at the same time his protest against the entire proceeding.

Judge Smith's opinion on the question of gubernatorial immunity turned largely on the construction of specific provisions of the Illinois constitution. On the broad issue of the exemption of a chief executive from arrest, based on citation of the ancient maxim that "the king can do no wrong," he held that the maxim refers solely to the "manner in which the official acts of the king are to be considered when construed and applied," and has no application in Illinois or to the case at bar. Counsel, appearing as amici curiae, had argued that as the state constitution provided for impeachment of the Governor, there could be no other punishment, citing the maxim "expressio unius est exclusio alterius." Judge Smith replied that the constitution exempted senators and representatives from arrest during a session, and also members of the militia at certain times, save for certain offenses, and made no similar provision for the Governor. Applying the same maxim, it followed that the Governor was not exempt.

Judge Smith further pointed out that impeachment was for misfeasance or malfeasance in office and for removal from office; and that the constitution further provided that "the party, whether convicted or acquitted, shall nevertheless, be liable to prosecution, trial, judgment and punishment according to law." This quotation he declared to be a direct declaration that an executive may be prosecuted whether in or out of office. The vice of the contention, he held, lay in assuming that impeachment was a punishment for crime, when it was not a criminal proceeding at all, but only a procedure to remove from office for misconduct while in office having no relation to an offense committed outside the office, and was so considered by the constitutional convention.

Moreover, in the convention which framed the constitution of 1870, an amendment prohibiting prosecution until after the expiration of the term of office had been expressly rejected—a clear indication of the constitutional intent. He added that if the prosecution in this case should be delayed until

the end of Governor Small's term, the statute of limitations would apply and there could then be no further proceeding.

Referring to the argument that arrest would constitute an attempt on the part of the judicial department to interfere with a co-ordinate department of the state government, he held there was no attempt by the judicial or legislative department to infringe on the rights of the executive. "This provision of the constitution," he said, "relates wholly to the department of the government and not to the individuals who may be engaged in performing the duties or exercising the powers of the department, unless the interference be in effect in some manner the exercise of the powers or the performance of the duties of the department. . . . The law has made full provision for officials who shall perform the duties of the department, and if one individual cannot perform the duties another can. Interfering with the official in his private capacity for some act or offense disconnected with official duties is not one department interfering with another."

The argument that prosecution would be contrary to public policy was met by the reply that the constitution and the legislative department, not the judiciary, declared public policy and he had found no warrant in constitution or laws for the view of public policy contended for by counsel. As to the intimation that the Governor could use the militia to protect himself, the court pointed out that the executive could only call out the militia to execute the laws, suppress insurrection and repel invasion; and added that it was hardly likely a Governor could call on it to help resist the execution of the laws or that the militia would respond to a call for such a purpose.

The question of gubernatorial immunity will, of course, be raised in any further proceedings that may be taken.

The Legal Entente Cordiale

The Texas Bar Association followed the example of the American Bar Association in promoting an international legal entente cordiale when it invited Justice Benito Flores, of the Supreme Court of Mexico, to deliver an address at its recent meeting. His address on the Mexican constitutional "writ of Amparo" appears in this issue. American lawyers will doubtless find interest in the following details of a distinguished legal career across the border:

Justice Flores was born in Fuente, Coahuila, Mexico, March 21, 1868. He opened his first law office in the City of Piedras Negras opposite Eagle Pass, Texas, and built up a large practice. Later he accepted appointment as judge of the district court and after several years of service was named as one of the Justices of the State Supreme Court, in which position he made an excellent record.

In 1902 he resigned from this position and opened a law office in the city of Torreon. He was immediately retained as counsel for many of the large banking, mining and other corporate interests in Mexico. For a time he was President of the Municipality and his administration was notable for various public works and for the impulse it gave to popular education. Judge Flores soon after spent some time in Europe. He took a course of studies at the Inns of Court, London, so as to familiarize himself with the laws of England, and also studied in both France and Belgium.

Upon his return to Mexico from Europe he opened law offices in Mexico City, in 1911. Subsequently he was elected Governor of the Federal District and, later, one of the Justices of the Supreme Court by the National Congress. He has continued to serve in that capacity up to the present time.

Reduced Fares for Annual Meeting

Members who expect to attend the annual meeting of the Association should note carefully the dates on which tickets are on sale in their territory. These are given below. They should also remember to ask for a certificate—not a receipt—at time of purchase, and to present it to the endorsing officer, W. Thomas Kemp, immediately on their arrival at Cincinnati, in order to secure a half fare rate on the return trip. Members in New England Passenger Association territory and certain parts of the Trans-Continental Passenger Association territory, in which no fare concession is made, should read carefully the method by which they may secure a reduction.

Central Passenger Association territory on August 23 and 24 and August 27 to September 2. This territory extends from Chicago, St. Louis and Cairo, to Buffalo and Pittsburgh, including the territory north of the Ohio River and extending as far north as the lower Peninsula of Michigan, inclusive.

Trunk Line Association territory, August 22 and 23 and August 27 to September 2. This covers the territory east of Buffalo and Pittsburgh, and north of the Potomac River, but not including the New England States.

Southeastern Passenger Association territory, August 22, 23, 24 and August 27 to September 2. This covers all of the states east of the Mississippi river and south of the Ohio and Potomac Rivers.

Southwestern Passenger Association territory, August 23, 24 and August 27 to September 2 from Arkansas and Louisiana; and August 22, 23, 24 and August 27 to 31 from other points. This territory covers Texas and other southwestern states west of the Mississippi River.

Western Passenger Association territory, August 23, 24 and August 27 to September 2, from Illinois, St. Louis, Hannibal, Mo., and Keokuk, Iowa; also August 22, 23, 24 and August 27 to 31 from other points in Western Passenger Association territory. This territory extends from Chicago and St. Louis as far west as the eastern boundary line of California, Nevada, Oregon and Washington.

Trans-Continental Passenger Association territory, August 21, 22, 23 and August 26 to 30 from Oregon (except points south of Portland), the entire state of Washington, and from points on the Great Northern Railway located in British Columbia.

From California and other Pacific Coast stations from which certificate plan concessions are not applicable members can avail themselves of round trip tickets on sale to Chicago and St. Louis, and at the latter points purchase one-way tickets to Cincinnati, at the same time asking for a certificate; full information as to detail fares and governing conditions can be obtained from Pacific Coast ticket agents.

The Trans-Continental Passenger Association territory covers traffic from Pacific Coast States.

New England Passenger Association territory, which includes the New England States, has no arrangement for reduced fares. However, members in those States can purchase a ticket to the nearest point in Trunk Line Association territory, and there purchase a ticket, on the above selling dates, to Cincinnati and secure a certificate which, when validated, entitles the holder to half fare on the return trip to the point in Trunk Line territory. Ticket agents in New England can advise members as to the best points outside of New England Association territory at which to purchase tickets and secure certificates.

EDWARD DOUGLASS WHITE

Lofty Statesmanship, Deep Learning, a Robust and Virile Mind and Dogged Tenacity of Conviction Characterized This "Ardent Patriot Who Knew No Emotion Equal to His Devotion to His Country and Her Welfare"

By Hon. John W. Davis

Former Solicitor General and Former Ambassador to Great Britain

EDWARD DOUGLASS WHITE, late Chief Justice of the United States, was born on the 3rd day of November, 1845, in Lafourche Parish, Louisiana; he died in the City of Washington on the 19th day of May, 1921. During the more than seventy-five years of his life, he was successively soldier, lawyer, State Senator, Judge, Senator of the United States, Associate Justice of the Supreme Court and Chief Justice. His career upon the Supreme Court began when he took the oath of office in succession to Mr. Justice Blatchford on the 12th day of March, 1894, in the forty-ninth year of his age. Sixteen years later, at the age of sixty-five, he was elevated to the Chief Justiceship and assumed his new office on the 11th day of December, 1910. He died in harness after ten more years of active and laborious service. To each office and occupation of his life he brought talents so marked and a personality so distinguished that he adorned in turn every post he was called upon to hold.

His span of life was marked throughout by great events. The guns of the Mexican War rang round his cradle, and he was to witness in his early manhood four years of civil war, followed by the slow and painful agonies of the reconstruction era in the South. In his own State he was to bear a leading part in the fierce contest over the Louisiana Lottery, and when he came to Washington it was to find an atmosphere electric with the animosities aroused by the struggle for the maintenance of the gold standard. Later came the war with Spain and the period of foreign expansion which followed it; the epoch of financial activity and corporate combination that marked the closing years of the twentieth century; and as his life was drawing to its end, there came the Great War and its aftermath. Seen in retrospect, it was a truly heroic period and the life of one who was active through it all will surely offer a tempting field to the biographer. To the American Bar, the years of highest interest are those which he spent upon the Supreme Bench, for certainly from 1894 to 1921 there was enough of labor and of interest in that tribunal to fill the measure of any single life.

When the late Chief Justice went upon the Court he was junior in years to any of his colleagues. The bench comprised Fuller, in the center, and in order of seniority, Field, Harlan, Gray, Brewer, Brown, Shiras and Jackson. All these were long to pre-decease him, and he was to witness also the disappearance of such later associates as Peckham, Moody, Lurton and Lamar. During his service, the Court disposed in one way or another of something like thirteen thousand cases, and one hundred and one volumes of reports testify to the written labors that were performed. In all this herculean task he bore a full share, and a truthful picture of his life upon the bench would be a record of all that transpired during his term of service. For in writing of a member of an appellate court, there is an essential unfairness in treating only of those opinions which bear his individual name. Mere concurrence or dissent may signify many hours of arduous toil. Like other mundane things, judicial labors should be tested by results, and it is the conclusion of the judge which should weigh finally in his account rather than the language in which it is expressed, whether his own or another's.

Attempting, however, only what is practicable within the scope of this paper, it may be noted that of the cases which were disposed of during the incumbency of the late Chief Justice, he wrote the opinion for the majority in more than seven hundred, and filed dissenting opinions in many others. While, if it were desired to fix the sum total of his written contribution, it would be necessary to add the memorandum opinions delivered *per curiam* after he assumed the Chief Justiceship, nearly all of which were announced by himself. The first of his opinions was that in the comparatively unimportant case of *Seeberger, Collector, v. Castro*, 153 U. S. 32, delivered on the 16th day of April, 1894, which construed the Tariff Act of 1883 as to the duty on tobacco scrap. The opinion is noteworthy only for its early exhibition of that antithetical or paradoxical method of statement which remained so marked a characteristic of his literary style. Thus he says,

> We could not hold the scraps or waste to be a manufactured article, unless we said that that which is neither manufactured nor partially manufactured was yet a manufactured article.

His last pronouncement was his dissenting opinion in *Newberry v. United States*, delivered on the 2nd day of May, 1921. It was his last appearance in the Court for his illness was upon him, but those who heard him marked the undiminished eloquence and force of his delivery, little dreaming that he would never fill that chair again. He asserted against the majority of his brethren the right of Congress to regulate primaries in the States for the nomination of candidates for the Senate, expressing his views in the terse statement that

> the influence of who is nominated for elective office upon the result of the election to fill that office is so known of all men that the proposition may be left to destroy itself by its own statement.

The difference in topic between the first and the last deliverance is in a way symbolic of the rapidity with which the political world has moved within the last three decades. Not only have these years been filled with great and moving events, but they have witnessed a flood of Federal statutes wholly unparalleled in number and novel in character, with many, perhaps most, of which the late Chief Justice was called upon to deal.

The world of 1894 seems by comparison with that of today a quiet if not exactly a humdrum place; and

yet in the year following Justice White's induction, the Court was to find itself the center of a political storm as fierce as any that has broken over it. After long debate, Congress had passed the Income Tax Act of August 15, 1894. The challenge of it in the courts was immediate, and the circumstances attending the decision of the question are still fresh in the public mind. In *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, decided on April 8, 1895, a majority of the Court held the levy upon rents or income from real estate to be a direct tax and the Act void as to such a levy for want of apportionment; the Court was equally divided upon the validity of a levy upon income from personal property, or the possible invalidity of any portion of the tax for want of uniformity. Justice White dissented in what was not only his first dissenting opinion, but his first opinion upon any grave constitutional question.

The words with which he opens his opinion have a permanent value of their own. "My brief judicial experience," said he, "has convinced me that the custom of filing long dissenting opinions is one 'more honored in the breach than in the observance.' The only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority and thus engender want of confidence in the conclusions of the court of last resort." Impressed by the gravity of the occasion, however, he proceeded at length to review the earlier decisions, and held, Harlan concurring, the income tax to be an excise, and the tax on rentals to be at most an indirect tax upon land. Never, perhaps, did he write with more force or clearness, rising to heights of genuine eloquence in asserting the duty of the Court to follow established precedents.

A rehearing was asked upon the points as to which the Court was in equipoise. Justice Jackson came from his sick-room to fill the bench, and on the 20th of May, 1895, the Court, by a vote of five to four, held a tax upon the income from personalty to be a direct tax also, and void as such for lack of apportionment, and the act as an entire and indivisible scheme of taxation to be null and void. It was obvious that the reargument had affected the views of one of the justices who made an equal division possible upon the former hearing; but there is good reason for thinking that subsequent surmise has been entirely in error as to the identity of the justice affected.

Justice White, with Justices Harlan, Brown and Jackson, again registered his dissent. His depth of feeling appears in this paragraph:

> The injustice of the conclusion points to the error of adopting it. It takes invested wealth and reads it into the Constitution as a favored and protected class of property, which cannot be taxed without apportionment, whilst it leaves the occupation of the minister, the doctor, the professor, the lawyer, the inventor, the author, the merchant, the mechanic, and all other forms of industry upon which the prosperity of a people must depend, subject to taxation without that condition. A rule which works out this result, which it seems to me stultifies the Constitution by making it an instrument of the most grievous wrong should not be adopted, especially when in order to do so, the decisions of this court, the opinions of the law writers and publicists, tradition, practice, and the settled policy of the government must be overthrown.

Nothing more vigorous than this was said in all the public agitation that followed; and it must have been with some glow of personal satisfaction that twenty-one years later the then Chief Justice found himself writing the opinion in *Brushaber v. Union Pacific Railroad Company*, 240 U. S. 1, holding that the Sixteenth Amendment conferred no new power upon Congress and that "there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock case was decided." It was but one of many instances in which he was to enjoy the satisfaction of seeing the views he had expressed in dissent become the prevailing law.

One other of the many decisions which he wrote upon matters of taxation is entitled to special rank as a judicial landmark. This is the case of *Knowlton v. Moore*, 178 U. S. 41, which dealt with the legacy taxes imposed under the War Revenue Act of 1898. The tax itself he held to be indirect in character and therefore within the constitutional rule that "all duties, imposts and excises shall be uniform throughout the United States"; but with great learning and irresistible logic he showed that the uniformity contemplated by the Constitution is not intrinsic uniformity, such as that demanded by the phrase "equal and uniform" in the Constitutions of the several states, but merely a geographical uniformity requiring the same plan and the same method to be operative throughout the United States. In its clearness and strength the opinion is not excelled, perhaps hardly equalled by any which he ever wrote; and in it he himself, within the limits of that modesty which always characterized his self-appraisal, felt and continued to feel a warranted pride.

It would be impossible within the limits of this article to tell the story of the Insular Cases, but one who turns in sequence the pages of *DeLima v. Bidwell*, 182 U. S., 1; *Dooley v. United States*, 182 U. S. 222; *Downes v. Bidwell*, 182 U. S. 244; *Dooley v. United States*, 182 U. S. 157; *The Diamond Rings*, 183 U. S. 176; *Hawaii v. Mankichi*, 190 U. S. 197; *Dorr v. United States*, 195 U. S. 138; and *Rasmussen v. United States*, 197 U. S. 516, will not only live again a vital period of American history but will witness a judicial drama of truly Olympian proportions. There may be found in these opinions the most hotly contested and long continued duel in the life of the Supreme Court.

When the Spanish War had resulted in the cession to the United States of Porto Rico and the Philippines, the question of their constitutional status at once arose. It entered immediately into the political arena, and in the Presidential campaign of 1900 divided with the cry of "Imperialism" political parties and their adherents. The discord which it created in the judicial forum was no less pronounced. The *De Lima, Dooley* and *Bidwell* cases presented in concrete form the questions whether the Island of Porto Rico after its cession by Spain ceased to be "foreign country" within the meaning of the existing tariff laws of the United States; and secondly, to what extent if at all the island fell within the revenue clauses of the Constitution, and the requirement that duties, imposts and excises should be uniform throughout the United States. The division of opinion on the court was sharp and pronounced.

The first view was that of Mr. Justice Brown, alone. He plowed a lonely furrow and held that while Porto Rico had ceased to be "foreign country" within the meaning of the Dingley Act, yet as to future legislation (the Foraker Act of April 12, 1900) the uniform clause did not apply; that Porto Rico became by the cession "territory appurtenant" to the United States,

but not a part of it; and that even over continental and contiguous territory, the Constitution went only as the result of express Congressional action.

As against this, Chief Justice Fuller and Justices Harlan, Brewer and Peckham maintained that Porto Rico, at least upon the ratification of the treaty, became a part of the United States, and as such could be dealt with only in the manner which the Constitution provides; or, in the language of the hour, that "The Constitution follows the flag."

Between these two extremes were to be found Justices White, McKenna, Shiras and Gray, who maintained that the government of the United States has power to acquire and hold territory without immediately incorporating it into the United States, and that Congress can determine when acquired territory has reached that state where it is proper that it should enter into and form a part of the American family; and that Porto Rico, though not a foreign country in an international sense, since it was subject to and under the sovereignty of the United States after the treaty of cession, continued to be foreign to the United States in a domestic sense because it had not been incorporated into the United States, but was merely appurtenant thereto as a possession.

These views were defended with a wealth of reasoning and a warmth of argument worthy of the greatness of the issue, but with the curious result that the judgment in the *DeLima* and *Dooley* cases was concurred in, though for wholly different reasons, by Justices Brown, Harlan, Brewer, Peckham and the Chief Justice; while that in the *Downes* case was supported by Justices Brown, White, McKenna, Shiras and Gray. The degree of heat engendered is apparent from the opinions of the minority in the *Downes* case. Said the Chief Justice:

> The contention seems to be that if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it like a disembodied shade in an intermediate state of ambiguous existence for an indefinite period; more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of Congress, irrespective of Constitutional provisions.

While Justice Harlan remarked with reference to the theory put forward by Justice Brown:

> We are informed of the liberality of Congress in *legislating* the Constitution into all of our contiguous territories. This is a view of the Constitution that may well cause surprise if not alarm.

And, turning upon Justice White and his associates, he said:

> I am constrained to say that this idea of "incorporation" has some occult meaning which my mind does not comprehend. It is enveloped in some mystery which I am unable to unravel.

Nevertheless, the "idea of incorporation" was destined to prevail. The familiar see-saw repeated itself once more in the cases of *Dooley v. U. S.* and the *Diamond Rings* in 183 U. S.; the majority in the former case being composed of Justices Brown, White, McKenna, Shiras and Gray, and in the latter, of Brown, the Chief Justice, Harlan, Brewer and Peckham. In *Hawaii v. Mankichi* the constitutional guaranties of trial by jury were held inapplicable to the Hawaiian Islands, Justice White taking occasion for himself and Justice McKenna to reiterate their views in *Downes v. Bidwell*, and Justices Fuller, Brewer, Harlan and Peckham filing the customary dissent. A year later came the case of *Dorr v. the United States*, in which the opinion written by Justice Day, who meanwhile had come upon the bench, held that the right of trial by jury was not extended by the Federal Constitution, without legislation and of its own force, to the Philippine Islands, ceded to the United States by Spain, but not incorporated into the United States by Congressional action. At last the ranks of the dissentients were broken, for Justices Peckham, Brewer and the Chief Justice concurred,

> simply because of the decision in *Hawaii v. Mankichi*. That case was decided by the concurring views of a majority of this court, and although I did not and do not (Peckham, J.) concur in those views, yet the case is authority for the result arrived at in the case now before us.

But care was taken in this dissenting opinion to deny the binding force of *Downes v. Bidwell*. Harlan alone was left to dissent outright, which he did with his usual vigor.

Finally, in *Rasmussen v. United States*, the question arose with reference to Alaska, and at last Justice White, writing for a clear majority of the court, was able to repeat with authority the views he had all along maintained. Turning, however, upon his erstwhile ally, Justice Brown, he declared his suggestion that the Constitution did not apply to a territory, even though incorporated, prior to its being organized, to be unsound and in irreconcilable conflict with the Constitution. This provoked an aggrieved rejoinder from Justice Brown, concluding with an expression of

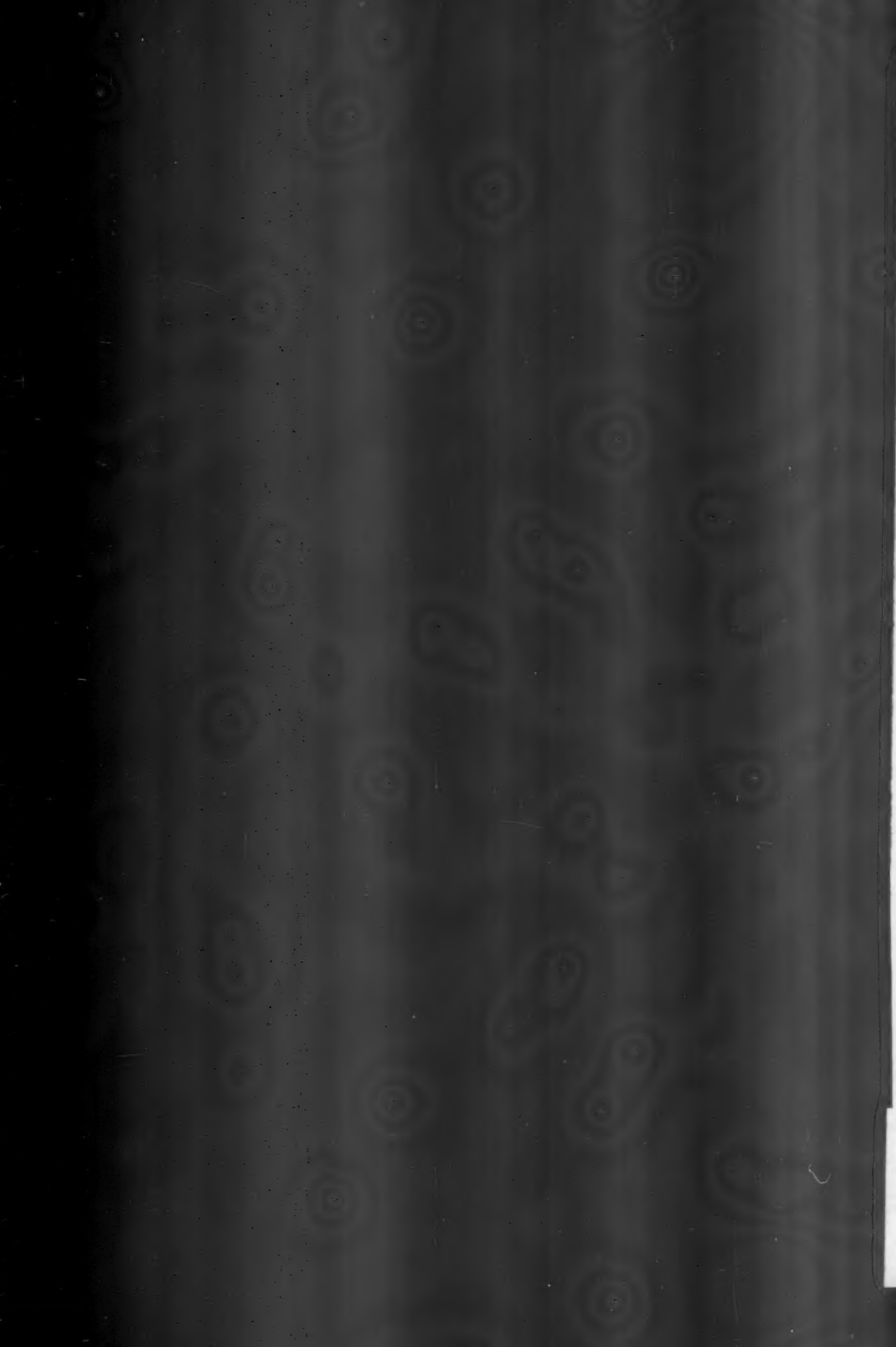
> regret that the disputed doctrine of incorporation should have been made the mainstay of the opinion of the court, when the case might so easily have been disposed of upon grounds which would have evoked no utterance of disapproval.

The only other discordant voice was that of Justice Harlan, who, although concurring in the instant result, nailed his colors to the mast on the main question and went down fighting to the last. Years later, in speaking of the controversy, Chief Justice White evidenced the depth of his conviction by the remark, "Why, sir, if we had not decided as we did, this country would have been less than a nation!"

Another instance among several in which the dissenting views of Justice White ultimately became the judgment of the majority of the court comes at once to mind. The Sherman Law was in its infancy when he went upon the court. The case of *United States v. E. C. Knight Co.*, 156 U. S. 1, was argued and decided during his first year of service, but in the debate between Chief Justice Fuller, who wrote the opinion of the court, and Justice Harlan, who dissented, White does not appear. His views as to the scope and purpose of the law were first put forward in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290. Speaking through Justice Peckham, the majority of the court held it judicial legislation to construe the act as relating only to contracts in unreasonable restraint of trade; but White, for a minority composed of Field, Gray, Shiras and himself, announced and defended the "rule of reason," thinking it

> impossible to construe the words "restraint of trade" used in the act in any other sense than as excluding reasonable contracts. The remedy intended to be accomplished by the Act of Congress was to shield against the danger of contract or combination by the few against the interest of the many and to the detriment of freedom. The construction now given, I think, strikes down the interest of the many to the advantage and benefit of the few. . . . The construction which reads the rule of

EDWARD DOUGLASS WHITE
From a photograph taken a short time before his death



> reason out of the statute embraces within its inhibition every contract by which workingmen seek to peaceably better their condition.

It was an attitude in which he and Justice Harlan once more found themselves in sturdy opposition, and which with their customary tenacity each was to maintain to the end. Justice White preserved his position by noting a dissent in the subsequent case of *U. S. v. Joint Traffic Association*, 171 U. S. 259, as also in the *Northern Securities Case*, 193 U. S. 197; but it was not until he had become Chief Justice and the Standard Oil and Tobacco cases were reached that he was called upon to deliver the opinion of the Court in an anti-trust case. The opportunity had come to review the entire argument, and this time he carried a majority of the court with him in laying down as the guide for its action

> the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve.

Those who were present in the courtroom when these memorable decisions were handed down will not soon forget the almost savage vehemence with which Justice Harlan announced his disagreement; but although Harlan with his dissent in the Tobacco case had the last word, the victory was with White.

It would be a heavy task to summarize all the decisions rendered by the late Chief Justice in the field of Interstate Commerce. The Interstate Commerce Act and the Sherman Law antedated his appointment but a few years, and after them came crowding upon the statute book all that flood of laws, like the Food & Drug Act, the White Slave Traffic Act, and the Harrison Anti-Narcotic Act, which mark a new era in the domain of Federal activity. Nor was he wholly without responsibility for their coming, for he was with the majority, and with Harlan, who spoke for it in the *Lottery Case*, 188 U. S. 321, which opened to Congress a new storehouse of power, and deserves to rank in its far-reaching effect second only to *Gibbons v. Ogden*.

Among others, he wrote the opinion of the court in the *First Commodities Clause case, United States v. Delaware & Hudson Co.*, 213 U. S. 366, in which he takes occasion to speak of

> the mistaken and baleful conception that inconvenience, not power, is the criterion by which to test the constitutionality of legislation;

in the *Second Commodities Clause Case, United States v. Lehigh Valley Railroad Company;* in the *First Employers Liability Cases*, 207 U. S. 463, in which, although the Act itself was found defective, the power of Congress to regulate the relation of master and servant on the railroads was sustained; in the *Intermountain Rate Cases*, 234 U. S. 476; and in *Wilson v. New*, 243 U. S. 332, involving the Adamson Eight Hour Law. The dramatic circumstances surrounding the passage of that act, the impending threat of a general strike upon all the railroads, and the impasse which had been reached in the negotiations to avert it, made the case one of wide-spread interest. It was not by accident that occasion was taken in the opinion to declare that

> whatever would be the right of an employe engaged in a private business to demand such wages as he desires, to leave the employment if he desires, and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest and as to which the power to regulate commerce possessed by Congress applies.

It was a deliberate suggestion of the power which lay in Congress to prevent a recurrence of the crisis, and an opening warning to the contending parties.

He seized the moment also to file a caveat against the over-extension of the doctrine of the Lottery case by saying:

> The powers possessed by government to deal with a subject are neither inordinately enlarged nor greatly dwarfed because the power to regulate interstate commerce applies. This is illustrated by the difference between the much greater power of regulation which may be exerted as to liquor and that which may be exercised as to flour, dry-goods and other commodities. It is shown by the settled doctrine sustaining the right by regulation absolutely to prohibit lottery tickets, and by the obvious consideration that such right to prohibit could not be applied to pig iron, steel rails or most of the vast body of commodities.

So one can read in his decisions the history of the long fight for Federal legislation against intoxicating liquors. It was he who wrote the opinions of the court in *Rhodes v. Iowa*, 170 U. S., 412; *Vance v. Vandercook*, 170 U. S. 438; and *American Express Co. v. Iowa*, 196 U. S. 133, dealing with things as they stood after the passage of the Wilson Act, which was aimed at the "original package" decisions. He it was again who pronounced the judgment in *James Clark Distilling Co. v. Western Maryland Railroad*, 242 U. S. 311, sustaining the Webb-Kenyon Act, and affirming the power of Congress to adopt as its own regulation the standard of lawfulness fixed by the legislation of the several states. And when the Eighteenth Amendment had arrived and was before the Court in *Rhode Island v. Palmer*, 253 U. S. 350, he was not content with the brief opinion rendered by his colleagues of the majority, but wrote a reasoned opinion of his own.

Space forbids further discussion of individual cases, but the mention of a few of those in which he wrote bears testimony to the catholic character of his service. Let there be named, for instance, the leading case of *Buttfield v. Stranahan*, 192 U. S. 470, settling the right to vest large powers in administrative officers; *Pacific States Telephone Company v. Oregon*, 223 U. S. 118, concerning the Initiative and Referendum; *Guinn v. U. S.*, 238 U. S. 347, and *Myers v. Anderson*, 238 U. S. 368, the Grandfather's Clause cases; *Virginia v. West Virginia*, 241 U. S. 531, in which he discussed and defended the power of the court to enforce its judgments against a sovereign state; *Bank v. Fellows*, 244 U. S. 416, upholding the Federal Reserve Act; *Marshall v. Gordon*, 243 U. S. 521, fixing the limits of the power of Congress to punish for contempt; *Northern Pacific Railway v. State of North Dakota*, 250 U. S. 135, discussing the effect of the war-time administration of railroads by the Federal Government; and the *Selective Draft Law cases*, 245 U. S. 366, in which, perhaps not forgeting his own taste of war, he speaks of the "supreme and noble duty of contributing to the defense of the rights and honor of the nation," and asserts "that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it."

These expressions exhibit him for what he was—an ardent patriot who knew no emotion equal to his devotion to his country and her welfare. To use one of his own favorite phrases, "it is true to say" that no one in all the land rejoiced more entirely than he

that the effort to divide the Union ended in failure. "My God!" said he once in horror-stricken tones, "My God, if we had succeeded!" Singularly enough, too, in view of his early history, he was in every fibre of his being a nationalist. While he knew and respected the boundaries between the Union and the States, as he did those between the three grand divisions of government, not Marshall himself was more, perhaps not even so much, of a thoroughgoing federalist as he. Over and over again he recurred to his thesis that the United States of America is a nation, and as such possesses all the powers necessary to its national existence; and he felt it a solemn duty to make sure that there was no denial by judicial decision of any power necessary in the present, or useful for the future.

Throughout his entire career, there is evident a deep sense of responsibility and an anxious care for the ultimate effect of the principles he announced. No one would have been quicker than he to shun any invasion of the legislative domain; indeed, he was careful time and again to repel the suggestion. But he fully realized the opportunity his great office afforded to shape the course of the nation, and he labored consciously and deliberately to that end.

The reported volumes give sufficient evidence of his lofty statesmanship; of the depth of his learning, the sweep of his robust and virile mind, and of the dogged tenacity with which he clung to and defended his convictions. They exhibit too his love of logical processes, his fondness for order in argument as in government, and his constant desire to test all of his conclusions in the double light of reason and precedent. But much of the man himself escapes the printed page: the dignity of his judicial bearing, his unfailing courtesy to the bar, his patience during argument, the swift thrust of his questions, his extraordinary memory which rendered him wholly independent of written notes, and in oral deliverance the fluency and beauty of his diction and the deep and melodious tones in which he spoke—all these are for memory alone. Nor do any books record the simple beauty of his private life, his gentle kindliness to all around him and the personal modesty which covered him with the cloak that only true greatness wears. Surely this man did justly, loved mercy and walked humbly with his God.

In the nature of things, the labors of a judge do not attract outside the legal profession the recognition afforded to the more showy displays of the forum or the executive chair; but the words he chisels in the living rock long outlive the work of other artisans. It is not too much to say that no man of his generation left behind him a memorial more lasting than did Chief Justice White, nor made deeper his personal mark upon the future of the nation. Suited by nature and called by fate to a great station, he filled it greatly and rests secure in his judicial fame. One may repeat of him with deep conviction the words in which he closed his own eulogy upon his predecessor:

> Mr. Attorney General, the resolutions of our brethren of the bar will be made a part of the records of the court. In making this order the thought comes unbidden to the mind that if there be in the future, by either the bench or the bar, a failure to discharge duty because of the want of an honest effort to do so, the resolutions will become the test of our moral insufficiency and be a relentless instrument for our condemnation. But the shadow created by these misgivings is at once dispelled by our conviction that although the Chief Justice has gone before, yet doth he abide with us by his precept and example, which I cannot refrain from hoping will be a spiritual beacon leading both bench and bar to a perfect dedication of all their powers to the complete discharge of their whole duty. Ah! in the luminosity afforded by that example and precept, and with the benign vision given by that faith which is the proof of things unseen, may the hope not be indulged in that the result of such a consecration to duty will enable us to behold a continued righteous administration of justice, a preservation of our constitutional government, the fructification of all the activities of our vast country for the benefit of the whole people, the abiding of tranquility and happiness in all the homes of all our land, and the continued enjoyment by all our countrymen of individual liberty restrained from license and safeguarded from oppression.

The Big Bar Meeting

"Time for the annual meetings of the American Bar Association and the Ohio State Bar Association in Cincinnati is now less than one month away. Reservations already made indicate a large attendance. Many wives and daughters are arranging to accompany the members and special arrangements are being made for their comfort and entertainment. The best the hotels afford will be reserved for them. A reception committee composed of prominent ladies are planning entertainment. This committee consists of Mrs. George Hoadly, chairman, who will be assisted by Mesdames Alfred C. Allen, Alfred H. Allen, Jonathan H. Allen, John V. Campbell, Robert deV. Carroll, Wm. A. Eggers, Frank F. Dinsmore, Robert E. Freer, Siegfried Geismar, Charles T. Greve, Ben L. Heidingsfeld, Smith Hickenlooper, Harry M. Hoffheimer, J. R. Holmes, Simeon M. Johnson, Harry B. Mackoy, Nathaniel H. Maxwell, Malcolm McAvoy, Albert H. Morrill, Harley J. Morrison, Ben B. Nelson, Hugh L. Nichols, Joseph W. O'Hara, James H. Perkins, Thomas L. Pogue, John R. Schindel, Murray M. Schoemaker, Burton B. Tuttle, Buckner A. Wallingford, Morrison R. Waite, John F. Winslow, William R. Wood, William Worthington, Misses Julie Galvin and Eleanor Gholson.

"Among the members of the Men's Reception Committee, are the seven Ohio Supreme Court judges, Hons. C. T. Marshall, James G. Johnson, Benson W. Hough, R. M. Wanamaker, James E. Robinson, Thomas A. Jones and Edward S. Matthias."—Ohio Law Bulletin and Reporter (Aug. 1).

An Editor on Lawyers

"Human society has at times proposed to eliminate lawyers from the scheme of life, but in every case it has recalled them. Much litigation is carried on but people forget, if they ever knew, that lawyers adjust and prevent nine controversies where one is brought before a court. The work of the bar is an essential cement in the edifice of human relations. Without its ministrations all order would disappear. Lawyers will understand, of course, that the word cement, above, is used in a figurative sense.

"Local lawyers were proud to greet their professional brethren and the general public joins with them in the welcome. The people respect them in spite of their pleas, petitions, quidnuncs, judgments, complexities, decrees, exceptions, writs, injunctions, and proclivities. Farewell, gentlemen, and come again."—Duluth (Minn.) *Herald*.

THE NAPOLEON CENTENARY AND ITS LEGAL SIGNIFICANCE

Consideration of How Far Bonaparte's Prophecy That "I Will Go Down to History with the Code in My Hand" Has Been Realized*

By Charles Sumner Lobingier
Judge of the United States Court for China

LAST month in France, Corsica, St. Helena and elsewhere, celebrations were held on the one hundredth anniversary of Napoleon's death. There were many literary and oratorical tributes to the great Corsican, most of which dwelt largely upon his military genius. This was natural, especially in view of the revival of Napoleonic strategy during the great war. For Marshal Foch himself ascribes his pivotal victories to his close study and observance of the rules of warfare evolved by him who began as "the little corporal." To some, however, he appears, paradoxically, as a promoter of democracy,[1] to others as a patron of industry,[2] while to the Abbé Vecocque, who preached the sermon for the mass at Notre Dame on May 4,

> Napoleon's great merit was that he restored religion to the country and to the cathedral where revolutionaries had crowned the Goddess of Reason.

But Napoleon himself placed a different estimate upon the relative values of his achievements. Almost at the close of his life he wrote:

> My true glory is not in having won forty battles; Waterloo will blot out the memory of those victories. But nothing can blot out my Civil Code. That will live eternally.[3]

I can think of no more fitting inquiry at this time by students of an institution avowedly devoted, as is this, to the comparative study of law, than to ascertain how far this prophecy of Napoleon has been fulfilled.

At the outset it may be well to inquire just what his part was in the making of the instrument which he so fondly called *"mon Code Civile."* I believe that a careful study of the subject will convince any impartial mind that but for Napoleon the Code would not have been produced—at least at that time.

Earlier Schemes of Codification

There had, indeed, been several prior attempts in that direction. The legal chaos that prevailed in France before the Revolution had engaged the attention of eminent Frenchmen for centuries. A single code for the whole country was the dream of King Louis XI in the fifteenth century, of Dumoulin (1500-66) and Brisson in the sixteenth, of Colbert and Lamoignon in the seventeenth, and of D'Aguesseau in the eighteenth. The four last named made substantial contributions toward such a project—Brisson,[4] by his compilation of the Ordinances in force under Henry III, Colbert and Lamoignon, through the more celebrated Ordinances[5] bearing the name of Louis XIV, and D'Aguesseau, whose Ordinances on wills, gifts, and entails appeared between 1731 and 1747, and "were thorough codifications."[6]

The States-General of 1560 voted for a code, and those of 1576 and 1614 again recommended one, and when, on June 17, 1789, that body became the National Assembly and seized the sovereign power, these juridical evils of the old régime were among the first to be denounced. Everyone recognized their enormity, but practical remedies were wanting. The deputies all said: "We must have a code," and after more than a year they adopted a resolution calling for "a general code of clear and simple laws."

But, notwithstanding the fact that nearly one-half the membership of the Assemblée Constituante was composed of lawyers, nothing further in that direction seems to have been accomplished by that body. The Constitution of 1791, framed by the same Assembly, embodies the promise of a code and the short-lived Legislative Assembly of the same year dealt with the problem in a feeble way. Its successor, the National Convention, which contained very few lawyers, took up the subject in 1793, impelled, it is thought, by the accumulating mass of new legislation, and in July of that year, appointed a committee "to replace the chaos of old laws and customs" and ordered it to report a draft within one month. The Committee consisted of Cambacérès, probably the most learned lawyer in the Convention, Treilhard, Berlier, Merlin de Douai, and Thibaudeau, and its draft, mainly the work of the first named, as chairman, was presented,[7] pursuant to order on August 9. But the Convention considered the work "too complex" and on November third referred it back to the Committee to be "simplified." Nothing more came of it, however, nor of a subsequent draft of two hundred and ninety-seven brief articles which Cambacérès later presented to the Convention[8]; and after a vain effort by him to interest the Council of Five Hundred in the project, it was allowed to languish for the remainder of the eighteenth century.

Napoleon's Code Commission

Bonaparte was now first consul, and the victory of Marengo gave him leisure for the pursuits of peace. More than any man in France he saw that its greatest

*Commencement Address before the Comparative Law School of China, Shanghai, June 25, 1921.

1 See Leslie Hore-Belisha, "Napoleon the Democrat," The Nineteenth Century, May, 1921, pp. 870 et seq. Cf. Emerson who claims Napoleon "as the incarnate democrat." Representative Men, 314.

2 E.g. encouragement of sugar belt culture.

3 De Montholon, Récit de la Captivité de l'Empereur Napoleon 401.

4 "About 1580, a celebrated jurisconsult, *Barnaby Brisson* (Brissonius), Advocate-General of the Parliament of Paris, and author of a widely used dictionary of law ('De verborum significatione'), compiled a systematic collection of the principal provisions contained in the Ordinances in force under Henry III. This prince, ambitious, it was said, to rival the glory of such men as Theodosius and Justinian, was about to give it royal sanction; but his death in 1589 prevented this. Brisson's work was published after his death under the title of 'Code Henry III.' Basilica."—Brissaud, *Manuel D'Histoire du Droit Français*, 3, 346, et seq., translation in *I Continental Legal History Series*, 261.

5 These included the Civil Procedure Ordinance of 1667, intended to expedite and cheapen litigation but which also limited judicial discretion; the Criminal Ordinance of 1670, really restricted to procedure and antiquated in many of its provisions though possessing "much merit;" the Ordinance of Commerce (1673), mainly the work of Jacques Savary, a Paris merchant; and the Ordinance of the Marine (1681), a careful codification of maritime law. Id., 264-65, 279.

6 Id., 279. Cf. 269.

need was a thorough over-hauling and unification of its laws. But still more he alone discerned the means by which reform was to be brought about. Napoleon discarded the old committee of the Assembly. He considered that it had demonstrated its incapacity, and on August 13, 1800, he proceeded to appoint a new commission to draft a real code. This was eleven years after the outbreak of the Revolution, one of the purposes of which was to reform the laws. Little had been accomplished in this direction in all that time, though startling changes had been taking place along other lines. Napoleon proceeded to look for the ablest and most competent man in the whole country; he disregarded all other considerations; he appointed no man as a codifier because of political affiliations; and he omitted none because of personal dislike. Of the four who were selected everyone was past middle age and a conservative, at heart attached to the old régime, and Napoleon knew it. He recognized perfectly well that their natural sympathies were with the past.

At the head of the commission he appointed Tronchet, aged seventy-three, and president of the Cour de Cassation. And what were Tronchet's antecedents? He was one of the counsel who had defended Louis XVI when prosecuted and finally executed by the revolutionists. In fact, he was called "The Nestor of the Aristocracy." Can one imagine a more remarkable appointment than that of a man who was practically the legal representative of the old régime, and who was thus placed at the head of a commission to codify the laws of new France? Yet Napoleon said of him later that he had been "the soul of the debates in the Council of State."[9]

Next in importance was Portalis, a Provençal, who had suffered imprisonment during the Revolution. He has been called[10] "the philosopher of the commission," for he "was specially distinguished in the art of legal and philosophical exposition."[11]

Then came Bigot de Preameneu, a native of Rennes and a mild supporter of the Revolution, but obliged to hide during the Terror. At the time of his appointment he was "government commissioner" in the Cour de Cassation.[12] It has been said that his "adroitness and pliancy were destined to be proved in more fields than one."

Finally there was Malleville, who had been a practitioner at Bordeaux and later a judge of the Cour de Cassation. He is said to have been "profoundly versed in the Roman Law" and became "the first of a long line of commentators on the Code," which he assisted in drafting.[13]

And not only was this commission distinguished in its personel from the individual standpoint; it was also collectively a representative one. For Tronchet and Malleville came from the bench, bringing to the work of the commission the benefits of judicial experience; Portalis and Bigot, per contra, represented the bar with a training no less valuable. Again Tronchet and Bigot came from "le pays du droit coutumier" and were schooled "in the Parlement and the custom of Paris." On the other hand, "Portalis and Malleville represented the legal traditions of the land of written law." This combination of elements and experience was ideal, and it is easy to understand how the outcome was a "compromise between northern Teutonism and the Latin inheritance of the south."[14]

The commission was appointed on August 12, 1800, "with instructions to bring the work to a conclusion in the following November."[15] The Code has been called "a hasty piece of work,"[16] and this was certainly the view taken in the Tribunate when the draft was before it.[17] But the draft was never intended by its promoter to be anything more than what the French call a *projet*—a mere step toward the final result. Napoleon wanted these men of learning in the old law to construct a frame work upon which he and others could labor by dissecting, discussing, testing and remodelling so as to fit modern conditions. Following this policy, he directed the draft to be sent next to the judiciary for comment and criticism to be submitted within three months. This done, the instrument was submitted for examination and revision to the legislative section of the Council of State, and then to the whole Council.

Napoleon's Part in the Framing

Up to this point, then, Napoleon had confined himself to the role of a chief of staff. He had dictated the plan of operations and required it to be carried out by others. But how much did he actually contribute to the substance of the Code itself? In the opinion of Professor Esmein[18] "the part that Napoleon took in framing it (the Code) was not very important" and "interesting as his observations occasionally are, he cannot be considered as a serious collaborator in this great work." But the same author states that, "in the discussions of the general assembly of the council of state Napoleon took part, in 97 cases out of 102 in the capacity of chairman"[19] and it seems clear from this that his share in the process of codification was by no means formal or perfunctory—much less a nominal one like Justinian's. Moreover other critics, even if unfriendly to Napoleon, are disposed to place a higher estimate upon the value of his labors in this connection. One[20] of them summarized Napoleon's direct contributions to the subject matter of the Code as including the articles governing the civil status of soldiers (Arts. 93-98) and aliens (Arts. II, 726, 912), the latter being discriminatory, and the system of adoption and divorce by mutual consent. But his influence extended much farther.

A none too friendly critic[21] observes:

> . . . his contributions to the discussion were a series of splendid surprises, occasionally appropriate and decisive, occasionally involved in the gleaming tissues of a dream, but always stamped with the mark of genius and glowing with the impulses of a fresh and impetuous temperament. . . . To Bonaparte's presence we may ascribe the fact that the civil law of France was codified, not only with more scrupulosity than other portions of French law, but also with a livelier sense of the general interests of the State. What those interests were, Bonaparte knew. They were civil equality, healthy family life, secure bulwarks to property, religious toleration, a government raised above the howls of faction. This is the policy which he stamped upon the Civil Code.

We have, too, the testimony of an eye-witness, Thibaudeau, as to the ease with which he maintained

7 "In the bombastic language suited to the time and the occasion." Rose, "The Code Napoleon," 40 Am. L. Rev. 833. 845.

8 Planiol, Traité Elémentaire de Droit Civil, 5 ed., 1908, translation in I Continental Legal History Series, 280.

9 1 Continental Legal History Series, 287.

10 Id. The same author adds: "Possibly he has been too highly praised. As a philosopher, he certainly did not possess an original mind; he attained only the heights of mediocrity; and his style, filled with the phraseology of the period, was soon antiquated. But he was not a mere jurist; he was an enlightened man, with an open mind, and a marked moderation; and it is for this that we should especially thank him."

11 9 Cambridge Modern History, 150.

12 1 Continental Legal History, 281.

13 9 Cambridge Modern History, 150.

14 Id., 151.

15 9 Cambridge Modern History, 150.

16 Id., 162.

17 Id., 153.

18 6 Encyclopaedia Britannica, II ed., 634.

19 Id. Mr. Rose (40 Am. L. Rev. 832, 850) speaks of "102 sessions, over 57 of which he presided," while the Cambridge Modern History (Vol. IX, 151) mentions 35 out of 87.

20 1 Continental Legal History Series, 288.

21 H. A. L. Fisher in 9 Cambridge Modern History, 151, 164.

his positions in debates with men who had made law a lifelong study. Another has said:

> On some points his influence may seem to have been unfortunate. But how small a price for the rest? His all-powerful will was the lever removing all obstacles. His energy and (why ignore it?) his ambition were the instruments to which we owe the achievement of the great task—a task which had been unfulfilled for centuries, and, but for him, might still in our own day have remained undone.[22]

Yet Napoleon, though the son of a lawyer, never took a law course; his training was only at a military school; and he had a hearty dislike for the *noblesse de la robe,* as the bar is called in France, though he never allowed this feeling to deprive the country of needed professional talent. How did he learn his law? Simply by utilizing all his odd moments. Once, while a lieutenant, he committed some trivial offense and was confined for several days in the guardhouse. The room contained a Latin copy of Justinian's Digest, which Napoleon's intensely active mind seized upon, and, through his prodigious memory, absorbed.[23] When presiding over the deliberations of the Council upon the draft code he was always quoting the Digest, and the members were asking each other: "Where did the First Consul get his knowledge of Roman law?" They might have found the answer in the poet's words:

> The heights by great men reached and kept
> Were not attained by sudden flight;
> But they, while their companions slept,
> Were toiling upward through the night.

How applicable this to one who did a giant's work, sleeping only four or five hours out of twenty-four.

Napoleon had also studied[24] Montesquieu, and although he did not accept all of the latter's political philosophy he could hardly have escaped (and evidently did not) the influence of Montesquieu's writings. Finally it was one of the secrets of Napoleon's greatness that he absorbed much from his associates. He was fond, in his campaigns, of taking specialists, jurists included, with him, and when on the march or in camp, while not actually engaged in battle, he had these men around him, questioning them, discussing their specialties with them and thus replenishing his own store directly from the best minds of his day. It was by utilizing the unusual situations and by making the most of his odd moments that Napoleon gathered legal knowledge. And this process continued even during these deliberations. As he debated he learned from those about him, and he was not like one convinced against his will. Upon one occasion he acknowledged:

> I first thought that it would be possible to reduce laws to simple geometrical demonstrations, so that whoever could read and tie two ideas together would be capable of pronouncing on them; but I almost immediately convinced myself that this was an absurd idea.

Realization

From the Council the draft went successively to the Tribunate and the National Legislature, in each of which it encountered opposition. But the First Consul was undaunted and resourceful. He devised a plan that met all difficulties, and on March 21, 1804, the *project* was approved by the legislature and promulgated.[25]

And so out of all this effort and discussion came the Code Napoleon,[26] as the instrument was to be known—the earliest practical realization of a dream five centuries old in France. But it was only the first fruits of the codification movement. The Code of Civil Procedure followed in 1806, the Code of Commerce in 1807, the Code of Criminal Procedure (Instruction Criminelle) in 1808, and finally the Code Penal in 1810.

Estimates of the Code

The Code Napoleon has never lacked critics, however, though they are far less conspicuous than formerly. When under discussion before the Tribunate, as we have seen, it encountered serious and, some still think, well-grounded opposition, including *inter alios,* two distinguished jurists, Andrieux and Simeon, the latter a brother-in-law of Portalis, one of the four draftsmen.

> "The Code Napoleon," says Brissaud[27], "was attacked with fury, even in France, by certain political parties blinded by hatred of the Empire. Those whose ideals were the Decrees of the Convention could not help looking upon this Code with disdain . . ."

Outside of France it was criticised by some eminent authorities including Savigny who characterized its framers as "dilettanti"[28] and their work as "only a mechanical mixture of the Revolution and pre-Revolution laws . . . not even a logical whole, a formal unity that might be logically developed to meet new cases."[29] His main point of attack, however, was political and there, as Brissaud well says,[30] "his patriotism carried him too far."

Moreover this contemporary criticism was levelled chiefly at provisions which, it was charged, were not adapted to France, and this the lapse of time has largely silenced. Surely the French people have had opportunity to judge whether this code is suited to them. And surely also no piece of legislation has ever acquired such permanence in France. The sentiment toward it there is comparable only to the American reverence for the Federal Constitution.

After more than a century the number of articles (2281) in the Code remains the same—a not insignificant mark of permanence. There have been amendments and modifications averaging about one for each year[31] but their importance is not generally recognized.[32]

At times a general revision has been mooted[33] but as Brissaud[34] says

> Up to the present time the idea of a general revision seems to find but a cool reception in the world of business. We must hope that the method of partial amendments will suffice for a long time to come.

Thus the identity of the Code as a whole is preserved intact. It has outlived all the dynasties and régimes that waxed and waned in France during the nineteenth century. Not even the restored Bourbons

22 1 Continental Legal History Series, 289.
23 Wells, Things Not Generally Known, 105.
24 3 Correspondence, 313 (No. 2223), letters of September 19, 1797; 2 Continental Legal History Series, 438.
25 Viollet, Histoire du Droit Civil Français, 2 ed., 236.
26 This title does not appear until 1807. "The Charters of 1814 and 1830 restored its original name. A Decree of March 27, 1852, reestablished the title of 'Code Napoleon,' 'in order to defer to the historic truth,' said the framer of the Decree. However, since the year 1870, universal usage (following that of the government) terms it merely 'Code civil.' Today the term 'Code Napoleon' is more suitably used to designate the original form of the Code, in contrast with its existing form, which is appreciably different." 1 Continental Legal History Series, 285.
27 1 Continental Legal History Series, 290-91, note.
28 Id.
29 2 Continental Legal History Series, 577.
30 Supra.
31 Walton, "The New German Code," 16 Juridical Rev. 148, note. Among them was the repeal of the divorce provisions in 1816. These were mainly restored, however, in 1884, the ground of incompatibility by mutual consent being omitted. See Smithers, "The Code Napoleon," 40 Am. L. Reg. (N. S.), 127, 127.
32 1 Cour de Droit Civil Francais, 5 ed., 13. Esmein, 6 Encyclopaedia Britannica, II ed., 634, 635, however, says: "The Code needed revising and completing and this was carried out by degrees by means of numerous important laws."
33 "Its entire revision was demanded at an early period; but this movement found little response until, in 1904, at the celebration of the centennial of the Civil Code, the Minister of Justice appointed a special commission to prepare a first draft of a revision." 1 Continental Legal History Series, 298.
34 Id., 298-99.

attempted to touch its contents; they merely sought to dim the fame of its chief promoter by omitting his name and calling it simply the Civil Code—an attempt as vain as it was petty.

Recent Criticism

It has been reserved for a very recent critic[35] to deny the code any virtue whatever as regards form:

> *The only merit* in Napoleon's Code is the fact that by legislative fiat it proclaimed one rule of law, where, before its enactment, there were half a dozen or more conflicting sources of law that might have applied.

He then proceeds to attack the following estimate in a work[36] of authority:

> The precision and the clearness of detail, in the phraseology of the articles, reached a grade which has never been surpassed and very rarely equalled. Certainly the laws passed in France since 1804 cannot bear comparison with the Code from this point of view; in contrast, the limpidity of the Code Napoleon becomes striking.

These statements, he declares, "are absolutely without foundation" and he endeavors to illustrate his claim by inquiring what the code has to say on restraint of trade—a subject which in most, if not all, legal systems has been largely developed since the code was promulgated. But this line of criticism was long since answered by Esmein[37] who pointed out that

> this only proves that it would not foretell the future, for most of these questions are concerned with economic phenomena and social relations which did not exist at the time when it was framed.

The whole subject of industrial relations together with those of artificial persons (corporations) insurance, bankruptcy, literary and artistic property, etc. were in their infancy at the beginning of the nineteenth century and French writers[38] have long recognized their absence as a defect. But surely a piece of legislation is not to be judged by its treatment of questions which were practically non-existent when it was framed.

And as to clearness the critic[39] last quoted seems to confuse that quality with completeness. The question is not whether the Code Napoleon exhausts every subject of which it treats but whether such provisions as it does contain are intelligibly and succinctly stated. And on that point all the authorities[40] of whom I have any knowledge hold in the affirmative.

Of course, also, due recognition must be accorded to the difference between Latin and Anglo-Saxon theories of legislative expression. From the Twelve Tables[41] onward conciseness has been one of the chief characteristics of the laws of Latin nations. In their view a code or statute should express only general principles and rules applicable to a group of cases, leaving the details to be worked out as they arise in specific instances. The Anglo-Saxon lawmaker too often essays the task (impossible of attainment) of providing for every contingency and including every case that might arise, meanwhile failing to express the general principle at all. The difference is analogous to that existing between the early American state constitution, with its brief bill of rights and framework of government, and the latter-day instrument which often goes far into the field of general legislation. There is much to be said in favor of each theory, but the difference must be clearly understood before the French codes and their imitators can be intelligently criticised.

To the Anglo-Saxon lawyer, the first impression of these codes is that simplicity has been carried to the point of superficiality. They purport to embrace within the compass of a single, small volume the law of a variety of subjects, each of which is treated under our legal system in one or more portly tomes (not to mention statutes), such as Citizenship, Domestic Relations, Contracts, Torts, Real and Personal Property, Bailments, Liens, Wills, Intestate Succession, and many minor topics. Austin, the English analytical, jurist, however, well said:

> The code must not be regarded as a body of law forming a substantive whole, but as an index to an immense body of jurisprudence existing outside itself.

And it may well be asked if the same is not equally true of the great Anglo-Saxon constitutional documents? How much of the vast body of law governing interstate commerce is contained in the Federal Constitution itself? Only these words: "The Congress shall have power . . . to regulate commerce . . . among the several states."[42] And has any one on that account criticised the Constitution, characterized the veneration paid it as a "misleading cult" and declared its "only merit" to be the substitution of one rule for several?

But the dangers lurking in this method did not escape the penetrating vision of Napoleon. Toward the close of the Council's deliberations on the Code he said:

> I often perceived that over-simplicity in legislation was the enemy of precision. It is impossible to make laws extremely simple without cutting the knot oftener than you untie it, and without leaving much to incertitude and arbitrariness.

Extension

The question as to the merits of the Code Napoleon must not be confounded with the distinct and broader one of codification in general. This is neither the time nor the occasion to discuss that subject; but I think no one will be bold enough to claim that the way out of the chaos in which Napoleon found the French law would have been to import the Anglo-American case system. "The codeless myriad of precedent" has prevented the extension of Anglo-American law to new fields—notably to Japan and China, which in reshaping their own law have deliberately followed the continental systems, largely because of their accessibility in the form of codes, of which Napoleon's was the progenitor.

> "The influence of the Code Civil," observes Professor Esmein, "has been very great, not only in France but also abroad. Belgium has preserved it, and the Rhine provinces only ceased to be subject to it on the promulgation of the civil code of the German empire."[43]

Professor Walton[44] adds, "It has, indeed, made itself to a great extent, the code of all the Latin races."

The progressive extension of the Code Napoleon's influence throughout the world will appear from the following table showing the date of promulgation of the codes of those numerous countries which have

35 R. Floyd Clarke in the American Law Review, LIV, 391.
36 1 Continental Legal History Series, 290.
37 Encyclopaedia Britannica, (11th ed.) 634, 635.
38. Id., I Continental Legal History Series, 290, 291.
39 R. Floyd Clarke, American Law Review, LIV, 391 et seq.
40 Mr. Clarke himself practically admits this when he says (American Law Rev., LIV, 394):
"The French codes have received from some quarters the highest praise. Mr. John Rodman, who translated them, says: 'The Code Napoleon is unquestionably a work of the highest merit, whether we consider the pure morality, the sound legal principles and enlightened reason which pervade every part of it, or the lucid order, precision and method with which the matter is arranged and exhibited.' Such also was Mr. Edward Everett's verdict.
30 North American Review 393. See also Codification in the State of New York, Robert Ludlow Fowler (pamphlet), p. 33."
41. "Their style is thoroly rugged and archaic—short pregnant sentences, evidently intended for the comprehension of the vulgar." The Juridical Review, XVII, 100.
42 Art. 1, sec .8.
43 6 Encyclopaedia Britannica, II ed., 634, 635.
44 "The New German Civil Code," 16 Juridical Rev. 148, 149.

made the French code their model: Belgium, 1804; Louisiana,[45] 1808; Austria, 1811; Hayti, 1825; Greece, 1827; Holland, 1838; Bolivia, 1843; Peru, 1852; Chili, 1855; Italy, 1865; Lower Canada (Quebec),[46] 1866; Portugal, 1867; Uruguay, 1868; Argentina, 1869; Mexico, 1870; Nicaragua, 1871; Guatemala, 1877; Honduras, 1880; Spain,[47] 1889; Salvador, 1889; Venezuela, 1896.

Permanent Influence

It was surely a great achievement to have brought order out of the legal chaos that marked pre-revolutionary France. But to the Code Napoleon belongs an even greater distinction. As one critic observes:

> . . . it has diffused the knowledge of law, and made it comparatively easy for the ordinary Frenchman to become acquainted with the leading principles which govern the law of his own country.[48]

Nor has this result been confined to France. If Savigny, founder of the historical school of jurisprudence, thought he saw failure for the Code because it had been "drafted at an unfavorable epoch," a successor, and perhaps greater than Savigny, in the same school, testifies to its phenomenal success:

> The highest tribute to the French Codes is their great and lasting popularity with the people, the lay-public, of the countries into which they have been introduced. How much weight ought to be attached to this symptom our own experience should teach us, which surely shows us how thoroughly indifferent in general is the mass of the public to the particular rules of civil life by which it may be governed, and how extremely superficial are even the most energetic movements in favour of the amendment of the law. At the fall of the Bonapartist Empire in 1815, most of the restored Governments had the strongest desire to expel the intrusive jurisprudence which had substituted itself for the ancient customs of the land. It was found, however, that the people prized it as the most precious of possessions: the attempt to subvert it was persevered in in very few instances, and in most of them the French Codes were restored after a brief abeyance. And not only has the observance of these laws been confirmed in almost all the countries which ever enjoyed them, but they have made their way into numerous other communities, and occasionally in the teeth of the most formidable political obstacles. So steady, indeed, and so resistless has been the diffusion of this Romanized jurisprudence, either in its original or in a slightly modified form, that the civil law of the whole Continent is clearly destined to be absorbed and lost in it. It is, too, we should add, a very vulgar error to suppose that the civil part of the Codes has only been found suited to a society so peculiarly constituted as that of France. With alterations and additions, mostly directed to the enlargement of the testamentary power on one side, and to the conservation of entails and primogeniture the other, they have been admitted into countries whose social condition is as unlike that of France as is possible to conceive. A written jurisprudence, identical through five-sixths of its tenor, regulates at the present moment a community monarchical, and in some parts deeply feudalized, like Austria, and a community dependent for its existence on commerce, like Holland—a society so near the pinnacle of civilization as France, and one as primitive and as little cultivated as that of Sicily and Southern Italy."[49]

And as Esmein[50] observes with evident and just national pride,

> Its ascendency has been due chiefly to the clearness of its provisions and to the spirit of equity and equality which inspires them.

And after comparing it with the German Civil Code "which, having been drawn up at the end of the 19th century, naturally does not show the same lacunae or omissions," he significantly adds:

> It is inspired, however, by a very different spirit, and the French code does not suffer altogether by comparison with it either in substance or in form.

No greater tribute could be paid the ill fated Corsican than the fact that now, over a century after its promulgation, his code is more influential than ever. Truly he is "going down to history with the Code in his hand!"

The Hotel des Invalides is doubtless the most magnificent of the world's mausoleums, not excepting the beautiful Taj Mahal at Agra, India—perhaps more delicate in construction, but not so imposing as that which lies beneath the dome of the *Invalides*. The historic associations, the superb embellishments, the "dim religious light" which falls through the shaded dome directly upon the sarcophagus of the hero—all unite to inspire the visitor with a feeling of awe. But to me the most impressive features of that entire structure were the bas-relief representing the Code and the inscription that encircles the great rotunda consisting of this sentence from Napoleon's will:

"I desire that my ashes repose on the banks of the Seine, In the midst of the French people whom I have so loved.

Historians who have considered only his wars, the countless lives lost in his campaigns, the misfortunes which befell France after his death,—have denied that Napoleon had the welfare of the country at heart and considered these words as lacking sincerity. But the work which he accomplished in the reformation and restatement of the laws of France furnishes ample argument to the contrary. These codes which brought order out of chaos and furnished a model for the whole world, remain not merely a monument to him, but a proof of his attachment to what he was fondly wont to call *"la grande nation."* It is this code that chiefly justifies now the tribute of the American poet, Leonard Heath:

> Spirit immortal, the tomb cannot bind thee,
> But like thine own eagle that soars to the sun,
> Thou springest from bondage and leavest behind thee
> A name which before thee no mortal hath won.

45 "It was modeled on the draft of the Code Napoleon (for a complete copy of the latter was not at that time accessible), and the whole body of French legal learning was thus introduced into the arguments and decisions of the courts of Louisiana." Dean Wigmore, "Louisiana, The Story of its Legal System," I So. L. Quart. 12. Cf. City of New Orleans v. Camp, 105 La. 288, 29 So. 340 (1901).

46 See 13 Col. L. Rev. 213, 215.

47 See the present writer's "A Spanish Object Lesson in Code Making," 16 Yale L. J. 411. The Spanish movement for codification in the nineteenth century received its inspiration from France, and the Civil Code of Spain, which is still in force, for the most part, in the Philippines and Porto Rico follows the Code Napoleon so closely that article after article will be found practically a translation from the latter.

So the Spanish Penal Code, of which the present edition dates from 1870 and is still largely in force in the Philippines, is modeled closely on the French Penal Code, particularly in the subject of penalties.

48 Fisher, 9 Cambridge Modern History, 161. "The Code has been thumbed and discussed till it has become extremely familiar, with the result that there are few countries in which some knowledge of law is so widely diffused as in France." Walton, "The New German Code," 16 Juridical Rev., 148.

49 Maine, Village Communities, 7 ed., 357-59.

50 6 Encyclopaedia Britannica, 11 ed., 684, 685.

Apparently Successful Start

Chattanooga, Tenn., Aug. 2.—To the Editor: Because I have been rather critical of the "Journal," having felt more than doubtful of its advisability, and because I am now an advocate of the form it takes I desire to express myself by way of giving encouragement.

Just yesterday this letter was prompted by a young lawyer saying that he regarded the Journal as well worth the annual dues and my opinion is that a great many lawyers will find it of sufficient interest to keep them in touch with the A. B. A. through membership.—JOHN A. CHAMBLISS.

THE WRIT OF AMPARO UNDER MEXICAN LAW

Origin and Operation of Procedure for Affording Federal Protection Against Laws or Acts of Authorities Violating Individual Rights and Against Infringement of Federal or State Authority*

By Benito Flores
Associate Justice of the Supreme Court of Mexico

I HAVE accepted the gracious invitation that the Texas Bar Association so kindly tendered me, to attend a meeting held by distinguished jurists on the occasion of the celebration of the 145th anniversary of the Independence of the United States, because I consider it an honor to the Mexican Bar and to my own country, and not a mere courtesy to my own humble self. Had I only considered my deficiency as a student of law, my absolute lack of literary gifts or the necessary command of the beautiful English language, I should indeed have been compelled to decline this honor, which I should have nevertheless appreciated in all its value. But the Texas Bar Association, fully realizing that science knows no frontiers and makes no distinction of language or race, has stretched out its friendly hand to us, lawyers living South of the Rio Grande, inviting us, through me, to this celebration; and I, therefore, thought it my duty to come, feeling that this will be one of those memorable days in my life that will necessarily stand out as a landmark carved in white stone after the poetic usage of the Romans.

In compliance with the suggestion made to me when I was invited that my study should deal with some topic of Mexican law, I will make a brief outline of our law of Federal Procedure which in Mexico we call "Juicio De Amparo" (Writ of Amparo), the purpose whereof is to make the supremacy of the Constitution effective over all other inferior laws, and which, entrusted to the Federal Courts and particularly to the Supreme Court, imposes on them the important duty of fixing and establishing the true meaning and application of the principles of Constitutional Law and of preventing the infringement of the said principles by anyone of the branches of the Federal or State governments.

In order to make my exposition more intelligible for those who are not familiar with the Constitutional Law of Mexico, I shall be compelled to make occasional references to American Constitutional Law. This is great boldness on my part, I grant; but my kind hearers, experts in their law, I am sure will be good enough to correct all my mistakes and supply any deficiency in my remarks.

The supremacy of the Constitution in the system of the American Government made it the duty of all judges in the country to enforce the said law preferably to any other, even in direct opposition, when the case arises, to inferior laws. It was so established by Marshall in one of his classic and famous decisions (Marbury vs. Madison); and this which now seems to us so obvious, so natural, almost conclusive, required then the strong character and unfaltering dedication of the eminent Chief Justice before it could gain the general approval of jurists and men in power.

In a system of government where laws have their different "rank," being as they are derived from different authorities whose powers are by no means absolute but subject to limitations imposed by the Federal Constitution, the judge has to decide, when a conflict arises, which law should prevail. The Supreme Court, as the only, or permit me to say, the supreme interpreter of the Constituiton, is the one which must utter the last word upon the subject.

In the United States this judicial system naturally sprang from the structure of the old colonial government. The charters of the colonies were always subordinate to the Constitution of Great Britain, and the laws issued by their legislatures were subordinate to their own charters. When the colonies, having become free states, formed the Federal union, the same difference of rank among the laws was established in the Federal Constitution, the State Constitutions, and the laws passed by the legislatures. The Judicial Department of the Federal Government, authorized as it was to uphold by its decisions the sanctity of the Constitution, had the power to keep the Legislative and the Executive departments within their limited functions, by declaring unconstitutional all arbitrary laws and acts brought in specific cases under the cognizance of the Judiciary. Thus was the judicial supremacy established, giving to the American system of Government its own special type, as distinguished from the European system, where, for instance in England, the supremacy of Parliament prevailed, and the solution of the most delicate constitutional or political questions is left to public opinion as reflected by the votes of the representatives of the people. These two different systems, both the offsprings of English genius, prevail now throughout the civilized world.

New Spain (as Mexico was formerly called) always differed entirely from the American Colonies from both a political and a legal point of view. An absolute Monarchy established by the Spanish Kings, and later on strengthened by monarchs from the House of Austria, came to form a special system of government for the administration of the Spanish-American colonies, wherein the private individual as such lacked all right of activity or participation, inasmuch as all orders originated from the King himself or from the Royal Council of the Indies, residing in Spain, or from the Viceroy and the "Audiencia" (a sort of Royal Court); in other words, from officials altogether subordinate to and who came from Spain. Furthermore, the Spanish colonies were always countries that possessed a written law and were governed exclusively by Royal decrees and ordinances in Spanish termed "cédulas," "ordenanzas" and "pragmáticas." Consequently Mexico, on becoming independent of

*A study prepared by Judge Benito Flores, Associate Justice of the Supreme Court of the Republic of Mexico, and read by him at a meeting of the Texas Bar Association held in San Antonio, Tex., July 5, 1921.

Spain, found itself, like all the other Spanish colonies in America, in a different situation from the Anglo-American colonies, which, though subject to the British Government, had their own charter constitutions and their legislative assemblies, thus to a great extent governing themselves.

Mexico was not, properly speaking, a monarchical country as it lacked those conditions that are necessary to promote the love of and respect for a King who lived in a distant continent, separated by the ocean which required months even to cross; and the accessible representative of the King, the Viceroy, did not enjoy all the regard and respect to which he was entitled. This was due to the instability of his position, to the constant vigilance exercised over him, the strict censorship to which he was subjected and the very serious responsibility to which he was held by special envoys who from time to time crossed over and brought special actions at law against him to test his responsibility; this was always the closing chapter of his incumbency. And even if at any time there ever was a feeling for monarchy in Mexico, it is a fact that upon the consummation of independence one hundred years ago (1821) the feeling had already disappeared or was substantially shattered; to which result the independence of the United States and their wonderful prosperity under their system of Federal Republic, the French Revolution, the upheaval brought about by the Napoleonic wars, and the liberal movement in Spain which so successfully resulted in the adoption of their Constitution of 1812 contributed in large measure. The Mexican revolutionary soldiers, from Hidalgo to Iturbide, perhaps with the single and most brilliant exception of Morelos and his followers, proclaimed independence of Spain, retaining, however, the monarchical form of Government, of which the King of Spain himself, or a Prince from his dynasty, was to be the head; nor may we determine to what extent such proclamations were sincere, as they could very well have been a mere scheme to win over followers and weaken the opposition to the achievement of the principal end, which was independence. In 1821 a monarchical Government under a Spanish king, which perhaps it might have been possible to establish, would have been very difficult to maintain; but with a king born in the new country it was simply impossible.

When independence became an established fact, people set themselves to determine the most suitable form of government, and through an evolution which to a large extent was spontaneous it became necessary to declare, in 1824, the old provinces free and sovereign states and promise them absolute freedom of their own internal government before they would agree to remain united and make of the whole independent country one entire new nation. The old province of Guatemala, which at the time of Iturbide's downfall separated from Mexico, divided itself before long into the five small republics of Central America, which are now endeavouring to get together again and thus make a more powerful and imposing nation.

The first Constitution of Mexico, in the year 1824, framed more from inspiration than after mature study, was a great success. The Constitution of the United States was in part adopted in this instrument; but the knowledge of the former in Mexico was very scanty and the details of its development were absolutely ignored. "The Federalist" seems to have been a thing utterly unknown, we had no other work in our libraries to spread the knowledge of it, and it is only now that Marshall's decisions are beginning to awaken the interest of our lawyers, thanks to the recent treatises of Mexican writers who have made a thorough study of American Constitutional Law, and to the interchange of ideas which the improved means of communications have brought about between both countries.

Upon setting up a new structure for the Judicial Power, the makers of the Constitution of 1824 had the great excellence of purposely ignoring the old traditional system of the audiencia courts (which were a special form of royal courts), and only had in mind what they considered purely federal matter, not going any further, however, than the mere superficial part of the express provisions of the American Constitution, and not suspecting that any possible conflict might arise between the different branches of the two different governments, State and Federal, created by the new system, nor the necessity of establishing the Judicial supremacy. Adhering to the Spanish-American tradition of considering the Legislative Power as the successor of the omnipotent king, and clothing that department with the right to exercise an unlimited sovereignty, the Constitution of 1824 vested in Congress the exclusive power to set at rest any doubt arising as to the interpretation of the principles of Constitutional law (Article 165), although it expressly established the supremacy of the Constitution over State laws (Article 161, Par. I).

In order to adopt the Federal system it was necessary to give the provinces of the old Colony the character of states, conferring upon them a sovereignty they never had before; but as the whole Colony acquired its sovereignty by reason of its independence, what was really done was to divide that entire sovereignty among the large states already formed within the national territory, giving each one a private portion thereof, which states in colonial times, and by reason of a movement for the reorganization of their administration which took place during the latter part of the eighteenth century, had been governed by the so-called "Intendentes," a sort of governors who were wholly subordinate to the Viceroy. Ideas about sovereignty were not really very clear in the minds of the first founders of the Mexican Republic; however, it does not require any great effort to determine the means that they employed to attain their intended purpose, that is of constituting the new nation in such a way as to enable all its several integral parts to enjoy some sort of autonomy in regard to their own internal affairs.

Subsequently there came two bogus constitutions, in 1836 and 1843 respectively. Both were centralist and contained absolutely reactionary provisions; observing popularity not even in form, and furnishing no aid towards the advancement of the principles of public liberty.

In 1847 the Constitution of 1824 was again declared to be in operation, amended by a sort of Constitutional Act, called "Acta de Reformas" (Amendatory Act), whereby for the first time power was given to the Federal Judiciary to "protect" (amparar) all persons against unconstitutional laws, from acts done by the Legislative or Executive departments of both the Federal or State governments, limiting its jurisdiction always to a "specific case" (caso especial),

and making no reference to such law or act as might be contested.

Certain Mexican jurists have thought that the origin of this provision lies in an old writ of the Roman Law called "de homine libero exhibendo," and others have pointed out the origin as being the legal protection that the Lord Justice of Aragon, in Spain, used to afford through special processes termed by the Spanish Law "inhibiciones" or "procesos forales" against any of the authorities and even against the King himself, wherever there was an illegal restraint of a person, or in cases called "de contra-fuero," that is, wherever the existing law was violated. In fact there is more than one resemblence between our present "Writ of Amparo" and the function of the old Justice in Spain of affording protection, about whom a publicist of the 16th century remarked that everyone turned to him as the "port of security during a storm, the shield for the defence of the oppressed and the stronghold of liberty."[1]

However, this old Spanish process never even reached Castille, whose laws alone operated in the Spanish-American colonies, neither did it survive in the province of its creation (Aragon) during the time of monarchical despotism in Spain, at which time the colonial government was organized and established. So that in practice there was nothing in the law of the colonies resembling the old process of the Lord Justice that has just been explained.

Therefore, it must be recognized that the roots of that institution created by the Mexican "Amendatory Act" of 1847 are not to be found in the Roman or Spanish precedents of the Mexican Law, but that its true and real origin is derived from American Constitutional Law. The drafter of this Act, Mariano Otero, a young Mexican lawyer from the State of Jalisco, of great intelligence and subtle political sense, already knew, though not thoroughly, that machinery of the Federal judicial institution of the United States, and he at least was the originator of the doctrine that was destined to have the strength to make it endure.

The doctrine established in the "Amendatory Act," was never formally regulated, and a draft of a law purporting to pass such regulation was merely introduced in Congress, under the wise and honest Government of General Arista in 1852, by the Department of Justice—an act which, however, was never approved. Consequently, the principle embodied in the Constitution by Otero remained simply as a seed destined to produce great and immediate fruit.

In 1857 was drafted the Mexican Constitution which can be considered permanent, and which retained the Federal system, although with certain deficiencies that had to be corrected (in 1874) when, subsequently to the Empire set up in Mexico and the French intervention, liberal doctrines and the federal system began to prevail. The framers of the Constitution took from the "Amendatory Act" already described the principle for the regulation of Mexican constitutional procedure, and being now more conversant with American theories and practice, from these they framed Mexico's special federal process known as the Juicio de Amparo (Writ of Amparo). What was for the Americans but a natural development from the old institutions of the English Common Law, in Mexico was the result only of legal reasoning, creating a novel system by invention, and one therefore difficult to apply and settle down. In the United States custom was the forerunner of the doctrine; in Mexico, the doctrine had first to be learnt, subsequently upon it it was necessary to build both custom and practice.

In the United States all cases involving the application of the Constitution (saving those of original jurisdiction) go up to the Supreme Court by appeal, whether they arise in State or Federal courts. In Mexico, where federalism and the existence of sovereign states making their own laws was an absolute novelty, there was the imminent danger of causing friction of jurisdiction and converting everything into Federal matter, under the guise of their being constitutional in character, as in colonial times when all cases could be brought on last resort to the so-called Audiencia Court. In order to avoid a confusion which would entail such grave consequences it was necessary to distinguish and separate the new procedure from the old practice, to which the Mexican people and the Bar had from time immemorial been accustomed. And even so it is very doubtful whether the desired result was really attained, as I shall explain in detail later on. As against its probable disadvantages the new procedure in Mexico had the excellence of being something introduced from the beginning in a completed shape, to which the Latin spirit is so much inclined.

In the Constitution of 1857 the nature and extent of the "Writ of Amparo" was determined under express general rules. After the jurisdiction of the federal courts was established concerning matters which may be properly considered judicial, because they only involve private rights or private interests, the power to employ the "Writ of Amparo" was exclusively granted to the Federal Judiciary, which power is really political in character, and under which the Judicial Department, whose highest and principal incarnation is the Supreme Court, does not act simply as judiciary, but as an actual branch of the National Government, and protects sovereignty itself, under its duty to uphold the supremacy of the Constitution.

The Constitution, in article 101, provides as follows:

> The Federal Courts shall decide any controversy arising: (1) From laws or acts done by any of the authorities, violating individual rights. (2) From laws or acts done by the Federal authorities affecting or restricting the sovereignty of the states. (3) From laws or acts done by the State authorities, intruding upon the Federal scope of authority.

In the last two paragraphs cases are involved which in theory seem to be the most important, because it is in such cases that the duty of the Supreme Court is precisely to prevent the Federal or State governments from transgressing their powers, by exceeding the limitations that the Constitution established for both respectively and encroaching upon fields that do not belong to them. But in practice this provision has been of very little importance, and one case of "Amparo" for transgression of authority hardly arises to every eight hundred cases (more or less) of "Amparo" for violation of "individual rights," to which the first paragraph of the clause refers.

It is also of interest here to make another remark: When the action of Amparo lies on the ground of the provision in paragraph I—according to theory and from the very language of the Constitution the "Writ of Amparo" is the established procedure for deciding when a law, either State or Federal, violates any one

1 *Tanquam ad portum pericilitatium, procsidium oppressorum et arcem libertatis.* Pedro Mueros. Attorney for the Spanish Crown.

of the rights or privileges secured by the Constitution in this sense—the writ cannot prevent the violation of constitutional provisions other than those affecting individual rights, that is, properly speaking, the civil rights of men upheld by the Constitution, which accords them full protection by prohibiting either the Legislative, Executive or Judicial departments of the Federal or State governments from passing any law or executing any act injuring those rights. In other words, each right guaranteed constitutes a restriction on public power.

In this connection it is also important to remark that practice has come to show that the importance of the power, through the "Writ of Amparo," to pass upon the constitutionality of the laws is greatly inferior to that of using the said writ against mere personal acts violating private rights, as very seldom a complaint is brought against the constitutionality of the law itself, whereas hundreds of cases are daily arising in which the point to be decided is whether certain facts to which the law was applied were established in evidence, or whether an act done by one of the authorities violates an individual right or not; there being many cases also in which the real issue turns exclusively on whether a particular authority did or did not execute the alleged act, in which cases the function of the Federal courts is simply confined to weighing the evidence introduced at the trial and passing judgment on these facts, while as regards the constitutional principle that may govern the case both parties, the complainant and enjoined authority, are perfectly in accord.

Individual rights form the subject-matter of the first part of our Constitution, comprised in XXIX articles with numerous provisions which are as a whole of great importance, and among which one should be particularly mentioned providing for the "exact application of the law" both in criminal and civil matters (this term corresponds to the American "due process of law"); which provision, after having given rise to long and heated discussions, wherein our famous Mexican Chief Justice, Vallarta, and other eminent jurists distinguished themselves, has for many years been the cause of the greatest number of litigations and of the most intricate and difficult cases, it being a general opinion that there is no legal controversy of any consequence which does not give rise to at least one "Writ of Amparo."

Although it can be easily implied from what has already been stated, it is not superfluous to say in explicit terms that the "Writ of Amparo" is not a general legal remedy for the prevention of every evil that may arise from the illegitimate exercise or the abuse of power conferred on the authorities, nor for all violations of the law, but that it is confined exclusively to the abridgement of individual rights and the encroachment upon State powers by the Federal Government, or conversely, upon Federal powers by the States.

In Mexican Constitutional Law it is just as true as it is in American law that:

> A court cannot declare a statute unconstitutional and void when the objection to it is merely that it is unjust and appressive, and violates rights and privileges of citizens, unless it can be shown that such injustice is prohibited, or such rights and privileges guaranteed by the Constitution. The propriety or justice or policy of legislation, within the limits of the Constitution, is exclusively for the Legislative Department to determine; and the moment a court ventures to substitute its own judgment for that of the Legislature, it passes beyond its legitimate authority, and enters a field where it would be impossible to set limits to its interference, except as should be prescribed in its own discretion. (Cooley. General Principles of Constitutional Law in the United States of America. Pages 166 and 167.)

According to the rules established in our Constitution, the "Writ of Amparo" only lies against laws or acts done by public officers, as distinguished from the "Writ of Habeas Corpus" of the English Common Law, which can be issued even against private individuals. In Mexico the unlawful acts of the individuals fall within the jurisdiction of the local civil or criminal courts, according to the nature of the case, and are tried by a different procedure under the provisions of whatever code or law may govern, without as a general rule having to apply constitutional provisions.

The Constitution at the beginning did not require that the Supreme Court should give its own decision in every case; but an Act passed in 1869, regulating procedure, enacted that although petition for a "Writ of Amparo" should be first started in the district courts, the decisions of these courts had to be reviewed by the Supreme Court, and thereby the latter acquired the power to test and examine any law or act done by public officers attacked as unconstitutional, and the Mexican new form of Government actually entered into the confines of Judicial Supremacy, that is, adopted that unique type framed by American Jurisprudence.

The Mexican Constitution of 1857 also laid down the basis of this procedure, by which it definitely established the character of the "Writ of Amparo" (Article 102) in the following literal language:

> All the cases to which the preceeding article refers shall be tried, upon the complaint of the injured party, by such pleadings and legal procedure as shall be determined by an Act passed to that effect. The decision shall be such as to relate only to private individuals, and be limited to afford them support and protection in the "specific case" in which suit is brought, making no general reference to the particular law or act which gives rise to it.

As in constitutional cases which arise in the United States, so the federal courts of Mexico cannot act officiously, that is on their own initiative. The Mexican courts only decide upon the isolated and specific case brought by the plaintiff and make no general reference as to the unconstitutionality of the act or law contested. The form of a judgment, simply reads as follows:

> The Judicial Department of the Republic hereby affords support and protection to John Doe against such and such acts done by such and such an authority.

In Mexico a controversy as to the constitutionality of a law or act done always begins in a Federal court, and the "Writ of Amparo" is never the continuation of a local suit (as the American "Writ of Error" is in an appeal from a state court), nor can a suit brought in the local courts be taken to the Supreme Court on appeal, and that is why we say that the "Writ of Amparo" is an action but not an appeal. It is true that any state court may take cognizance and begin the trial of any action of "Amparo" in places where there is no Federal court; but in such a case the court does not act as a state court, but simply as an ancillary or substitute for the Federal courts, subordinate to their superior command, and the local court must follow then the Federal "Amparo" law, entirely free from its own local laws.

If in a case, either civil or criminal, brought in a state court a constitutional question arises, either of the parties, believing that a right guaranteed by article

101 has been violated, may begin the action of "Amparo" in a Federal court of jurisdiction, whose decision according to the old law as it prevailed until 1917 had to be reviewed by the Supreme Court.

Upon beginning suit the plaintiff, ordinarily, prays for an injunction against the particular act or acts complained of, thereby giving rise to a species of supplementary process of great importance, and which must be decided before the merits of the case, as its purpose is to restrain the further commission of the wrongful act, when such act is of a continuous nature, or to prevent its final consummation, which would leave nothing of the case itself. The court is bound necessarily to decree the injunction when the final commission of the act complained of cannot be subsequently remedied, as capital punishment, for instance; or if it can only be inadequately and incompletely remedied; or again when the plaintiff furnishes a bond to hold third parties free from damage by reason of the said injunction, providing that the latter does not interfere with the people or the Government. In practice, controversies referring to the injunction of acts complained of give always rise to a large and complicated number of questions, and the precedents established by the Supreme Court in this subject are already numberless.

Once the petition for an injunction is granted, the case itself is tried until final judgment is passed, the following persons being admitted as parties to the suit, with the right to litigate and bring in evidence: the plaintiff, the particular authority or official who executed the act complained of, which we call "responsible authority," the Attorney General of the Federal Government, and any other person who may be injured by enjoining or declaring the act complained of as unconstitutional, such as the original defendant in a state case who obtains judgment, and against which judgment the "Writ of Amparo" is then petitioned in a federal court, or the very individual who, acting in the name of the particular authority, actually executes the act. In criminal prosecutions the accuser or complainant is not considered as a party to the action, as the rule is that the right to prosecute and punish delinquent persons belongs exclusively to the prosecuting attorney, no personal accusation or indictment being admissible, not even from the party injured by the crime.

The effect of a judgment granting the petition for an "Amparo," is to restore all things as they were before the act violating the Constitution was committed, which act, consequently, is thereby made altogether null and void, as if it had never been executed.

The procedure for trying an action of "Amparo" is in theory very brief, and if it were pressed without delay, it would not last more than three or four months; but in actual practice the case is indefinitely protracted by reason of the great number of other cases that one single judge of a district court has to handle at the same time, by which very naturally the performance of a judge's duties is greatly handicapped. The solution of this evil would be to increase the number of district judges, without amending the legal provisions of the procedural law. In the same predicament, and probably in a larger degree, is the Supreme Court of the Nation itself.

An action of "Amparo" is not by the law of Mexico or by its court rules of practice ever allowed to be brought unless it is true and real; that is, in Mexico a question cannot be taken up before the Supreme Court by way of a "test case." The opinion of this Court, therefore, cannot be known before a concrete case is actually brought up.

I believe that if a minute comparison were made between the different kinds of writs and proceedings existing in American practice to prevent constitutional violations and our peculiar "Writ of Amparo," the conclusion arrived at would be that the Mexican process has its own disadvantages in comparison with the American; but that it also has obvious advantages. In any event, our process is undoubtedly the best adaptation ever made of that wonderful American creation to the Spanish countries governed under the federal system. To accept the American procedure exactly as it was, in other words, to copy it in form, would have been a great mistake, because it would have been then absolutely impracticable. The old judicial system of the Spanish-American countries had no historical precedent that would have aided in the exact adoption of the American doctrine; on the contrary it was probably an unsurmountable barrier.

I have had the honor, gentlemen, succinctly to present to you—any other form would have been impossible—our constitutional process as created by Mexican jurists up to its last stage of development during the life of our Constitution of 1857. In that great work the following, among others, distinguished themselves and are responsible for its creation: its real founder, Mariano Otero (died 1850); Mariscal, framer of the procedural Act of 1869, which laid the foundations of the "Amparo" process (died 1909); Lozano, a serious and profound expounder of constitutional civil rights (died 1893); and Vallarta, the most famous of the Chief Justices of the Supreme Court (died 1893). Among the living one at least must be cited, Mr. Rabasa, whose various treatises on Mexican Constitutional Law are a model of clear exposition and an inexhaustible source of pure, true science, which do honor not only to Mexico, but to all the Spanish-American countries.

Gentlemen: Pray accept my heartfelt thanks for your courteous invitation to this meeting, for the gracious and patient attention that you have bestowed upon my words, which, believe me, I would never have ventured to utter before so illustrious and enlightened assembly but for my eagerness to give you a slight token of my profound regard and admiration for all who devote themselves to the study of Law.

Chief Justice Taft Makes Appointment

One of Chief Justice Taft's first official acts was the designation of William R. Stansbury to act as deputy clerk of the U. S. Supreme Court until that body convenes in October. The appointment was rendered necessary by the recent and unexpected death of deputy clerk H. C. McKenney, who took charge when Clerk James D. Maher died a short time ago.

Interesting the Public in Law

Members of the Aurora (Ill.) Bar believe that the public as well as the Bar can be interested in the discussion of certain legal questions. With this idea they have set about establishing a "Lyceum of Law." Legal subjects will be chosen for consideration and discussion and the public will be especially invited to attend the meetings.

REVIEW OF RECENT SUPREME COURT DECISIONS

Rights of Trustee in Insurance Policy—Time Limit for Ratifying Constitutional Amendments—Corrupt Practices Act and Primaries and Elections for Senators and Representatives—Duty to Retreat in Self-Defense—Bribery of Federal Official—Controversies Between States—Tax Cases

By Edgar Bronson Tolman

Bankruptcy—Rights of Trustee in Insurance Policy

Elliott Frederick, Trustee v. Fidelity Mutual Life Ins. Co. Adv. Ops. p. 609.

A policy of insurance on the life of one John E. Schmidt in the sum of $1,000 was made payable to his wife. A petition in involuntary bankruptcy was filed against him. He was adjudged a bankrupt and the petitioner was elected and duly qualified as his trustee. The policy of insurance was not scheduled in bankruptcy. On the date of the adjudication it had a cash surrender value of $322. Some months later, the bankruptcy proceeding being still pending, he died, the widow made proof of the fact and cause of death and the company paid to the beneficiary the face of the policy and took her receipt therefor without knowledge of the adjudication in bankruptcy or notice that the trustee would claim under the policy. The trustee brought suit in a State Court for the cash surrender value of the policy at the date of the adjudication of bankruptcy, a judgment was rendered for the defendant, which was affirmed on appeal and the record came before the Supreme Court on writ of certiorari.

Mr. Justice Pitney delivered the opinion of the court and after citing the provisions of paragraphs (3) and (5) of Section 70a of the bankruptcy act, said:

> This provision shows it was the purpose of Congress to pass to the trustee whatever sum was available to the bankrupt at the time of bankruptcy as cash assets, to be realized on surrender of the policy, but otherwise to leave to the insured the benefit of his life insurance. . . . Here the question is whether, after the death of the insured and payment of the stipulated amount to the beneficiary named in the policy, in strict conformity to its terms, without notice of the bankruptcy or claim made by the trustee, there is a liability on the part of the insurance company to pay to the trustee the surrender value that, on complying with the terms of the policy, he might have demanded.

It was held that the insurance company had rights under the contract as well as the insured; that the trustee could not demand the payment of the surrender value of the policy without timely notice of a demand, and that the company, having in good faith performed the contract according to its terms without service of notice by the trustee of his intention to call for a surrender of the policy, could not be required to make any further payment.

Constitutional Law.—The 18th Amendment, Time Limit for Ratification

Dillon v. Gloss, Deputy Collector, etc., Adv. Ops., p. 611.

This case came before the Supreme Court on an appeal from an order denying a petition for writ of habeas corpus. Petitioner was in custody under the National Prohibition Act, on a charge of transporting intoxicating liquors, and sought to be discharged on several grounds, all but two of which were abandoned after decision in the National Prohibition Cases (Rhode Island v. Palmer, 253 U. S. 350). The grounds not disposed of in those cases and presented here were, first, that the 18th Amendment is invalid because the congressional resolution proposing the amendment declared it should be inoperative unless ratified within seven years; and, secondly, that the Act had not gone into effect at the time of the asserted violation nor at the time of the arrest. Mr. Justice Van Devanter delivered the opinion of the Court. Citing Article 5 of the Constitution, he said:

> It will be seen that this article says nothing about the time within which ratification may be had—neither that it shall be unlimited nor that it shall be fixed by Congress. What, then, is the reasonable inference or implication? Is it that a ratification may be had at any time, as within a few years, a century, or even a longer period; or that it must be had within some reasonable period which Congress is left free to define? Neither the debates in the Federal convention which framed the Constitution nor those in the state conventions which ratified it shed any light on the question.

The learned Justice then reviews the history of the amendments to the Federal Constitution. He shows that twenty-one amendments had been proposed by Congress, seventeen of these had been ratified, some within a single year after the proposal and all within four years. The four which had not been ratified by three-fourths of the states had been ratified in some of the states. He calls attention to an effort eighty years after the recommendation of one of these amendments to complete the ratification thereof by a joint resolution of the Legislature of Ohio, but shows that there was great division of opinion as to the propriety and legality of ratification after so great a lapse of time and that the effort was abandoned. He shows that two of these amendments which lack only one of the required number of legislative ratifications had lain dormant for a century, and that another proposed during the initial stages of the slavery controversy was forgotten and abandoned after the passage of the 13th Amendment, and from this history the learned Justice concludes that whether an amendment proposed without fixing any limit of time for ratification which, after favorable action in less than the required number of states, had lain dormant for many years, could be resurrected and its ratification completed, had been mooted on several occasions and was still an open question. These historical facts were known to and debated in Congress in connection with the 18th Amendment, and seven years was fixed as the period for ratification on the ground that some limitation must be made and that seven years was a reasonable period. The learned Justice said:

> That the Constitution contains no express provision on the subject is not in itself controlling; for with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed.

Reviewing and analyzing the provisions of the

Constitution for the method of proposal and ratification, he says:

> The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the states shall be taken as a decisive expression of the people's will and be binding on all.

The learned Justice then proceeds to draw the following deductions as to the particular question in view and declares that there is nothing in the article which suggests that amendment, once proposed, is to be open to ratification at all times, or that ratification in some of the states may be separated from that in others by many years and yet be effective, but declares that he does find within the article that which strongly suggests the contrary:

> First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which, of course, ratification scattered through a long series of years would not do . . . We conclude that the fair inference or implication from Article 5 is that the ratification must be within some reasonable time after the proposal.

He therefore reaches and announces the conclusion that Congress had undoubted power to fix within reasonable limits a definite period for the ratification of a proposed amendment and that seven years, the period fixed in this instance, was reasonable.

As to the second point urged—that the National Prohibition Act was not in force at the time of the alleged violation and arrest—it is shown that the Act was by its terms to be in force from and after the date when the 18th Amendment should go into effect, and the amendment provided that it should go into effect one year after being ratified. Its ratification was consummated January 16, 1919. The fact that the Secretary of State did not proclaim its ratification until January 29, 1919, was declared to be not material for it is the date of consummation and not that of proclamation, which controls. The order of the District Court for the Northern District of California denying the writ of habeas corpus was therefore affirmed.

The case was argued for the appellant by Levi Cooke and for the Government by Assistant Attorney General Adams.

Criminal Law.—(a) Corrupt Practices, Election of Senators and Representatives, Primaries

Newberry et al. v. United States, Adv. Ops., p. 554.

Newberry and others were found guilty of conspiring to violate the Federal Corrupt Practice Act in the campaign for the nomination and election of United States Senators at the primary and general election of 1918 in Michigan. The Act of Congress, taken with the statute of that state, in effect declares a candidate for the United States Senate punishable by fine and imprisonment, if (except for certain specified purposes) he give, contribute, expend, use, promise or cause to be given, expended, used or promised in procuring his nomination and election more than $3,750—one-half of one year's salary.

Mr. Justice McReynolds delivered the prevailing opinion, which held that the trial court erred in not sustaining the demurrer which challenged the constitutionality of Section 8 of the Federal Corrupt Practice Act, under which the defendants were convicted, and said:

> Manifestly this section applies not only to final elections for choosing Senators, but also to primaries and conventions of political parties for selection of candidates. Michigan and many other states undertook to control these primaries by statute and give recognition to their results. And the ultimate question for solution here is whether, under the grant of power to regulate the "manner of holding elections," Congress may fix the maximum sum which a candidate therein may spend, or advise or cause to be contributed and spent by others to procure his nomination.
>
> Section 4, Article 1, of the Constitution provides:
> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators" . . .

The precise point presented may be briefly restated as follows: The sole source of authority for the act of Congress was the constitutional grant of power "to regulate . . . the manner of holding elections." Did this authorize legislation limiting the amount to be expended in procuring nominations for office? The opinion continues:

> Undoubtedly elections within the original intendment of Sec. 4 were those wherein Senators should be chosen by legislatures and Representatives by voters possessing "the qualifications requisite for electors of the most numerous branch of the state legislature." (Art. 1, Secs. 2 and 3.) The 17th Amendment, which directs that Senators be chosen by the people, neither announced nor requires a new meaning of election, and the word now has the same general significance as it did when the Constitution came into existence—final choice of an officer by the duly qualified electors. . . . Primaries were then unknown. Moreover, they are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors. General provisions touching elections in constitutions or statutes are not necessarily applicable to primaries—the two things are radically different . . .

Sundry provisions of the Constitution were cited as indicating "plainly enough what its framers meant by elections and the manner of holding them." The language of the 17th Amendment and of the portions of the original Constitution directly affected by it are compared and it was said:

> As finally submitted and adopted the Amendment does not undertake to modify Art. 1, Sec. 4, the source of congressional power to regulate the times, places and manner of holding elections. That section remains "intact and applicable both to the election of Representatives and Senators." When first reported . . . the proposed 17th Amendment contained a clause providing: "The times, places and manner of holding elections for Senators shall be as prescribed in each state by the legislature thereof"—the avowed purpose being thereby to modify Sec. 4, Art. 1, by depriving Congress of power to regulate the *manner of holding elections* for Senators . . . Upon recommendation of a minority of the Judiciary Committee this clause was eliminated and reference to Sec. 4, Art. 1, omitted from the Resolution.

The opinion referred to decisions upholding Federal Statutes providing for supervisors at general elections and prohibiting interference with them, declaring criminal the failure by election officers to perform duties imposed by the state, and denouncing conspiracies

to prevent voters from freely casting their ballots or having them counted, saying:

> These enactments had direct and immediate reference to elections by the people, and decisions sustaining them do not control the present controversy . . . Our immediate concern is with the clause which grants power by law "to regulate the *manner of holding* elections for Senators and Representatives,"—not broadly to regulate them. As an incident to the grant there is, of course, power to make all laws which shall be necessary and proper for carrying it into effect . . . If it be practically true that, under present conditions, a designated party candidate is necessary for an election,—a preliminary thereto,—nevertheless his selection is in no real sense part of the manner of holding the election. This does not depend upon the scheme by which candidates are put forward. Whether the candidate be offered through primary, or convention, or petition, or request of a few, or as the result of his own unsupported ambition, does not directly affect the manner of holding the election. Birth must precede, but it is no part of either funeral or apotheosis.
>
> Many things are prerequisites to elections or may affect their outcome,—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these. It is settled, e. g., that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacturing, mining, etc., commerce could not exist; but this fact does not suffice to subject them to the control of Congress . . .
>
> Elections of Senators by state legislatures presupposed selection of their members by the people; but it would hardly be argued that therefore Congress could regulate such selection . . . We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the state, and infringe upon liberties reserved to the people.

In conclusion the opinion holds that, exercising its inherent police power, the state may suppress whatever evils may be incident to primaries or nominating conventions, and that as each House is the judge of the elections, qualifications and returns of its own members, and as Congress may by law regulate the times, places and manner of holding elections, the National Government is not without power to protect itself against corruption, fraud or other malign influences.

Mr. Justice McKenna concurred in the opinion "as applied to the statute under consideration," but reserved the question of the power of Congress under the 17th Amendment.

It will be noted that the opinion of the majority involved only the unconstitutionality of the Act of Congress and that it was silent in regard to the errors assigned to the charge of the court to the jury in regard to the construction of the Act—error which the dissenting justices declare to be so grave and vital as to compel their assent to the judgment of reversal, although they did not assent to the reasons assigned for that judgment by the majority of the court.

The late Chief Justice filed a dissenting opinion in which he discussed the question of power, first from the provisions of the Constitution as they existed before the Amendment, and, second, in contemplation of the light thrown upon the subject by the force of the Amendment, saying:

> The provisions of Secs. 2 and 3 of Article 1 of the Constitution, fixing the composition of the House of Representatives and of the Senate, and providing for the election of Representatives by vote of the people of the several states, and of Senators by the state legislatures, were undoubtedly reservoirs of vital Federal power, constituting the generative sources of the provisions of Sec. 4, clause 1, of the same article, creating the means for vivifying the bodies previously ordained (Senate and House) . . . (quoting Sec. 4 supra).
>
> As without this grant no state power on the subject was possessed, it follows that the state power to create primaries as to United States Senators depended upon the grant for its existence. It also follows that, as the conferring of the power on the states and the reservation of the authority in Congress to regulate being absolutely coterminous, except as to the place of choosing Senators, which is not here relevant, it results that nothing is possible of being done under the former which is not subjected to the limitations imposed by the latter . . . But it is said that, as the power which is challenged here is the right of a state to provide for and regulate a state primary for nominating United States Senators free from the control of Congress, and not the election of such Senators, therefore, as the nominating primary is one thing and the election another and different thing, the power of the state as to the primary is not governed by the right of Congress to regulate the times and manner of electing Senators. But the proposition is a suicidal one, since it at one and the same time retains in the state the only power it could possibly have, as delegated by the clause in question, and refuses to give effect to the regulating control which the clause confers on Congress as to that very power. And mark, this is emphasized by the consideration that there is no denial here that the states possess the power over the Federal subject resulting from the provision of the Constitution, but a holding that Congress may not exert, as to such power to regulate, authority which the terms of the identical clause of the Constitution confer upon it . . .
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> In last analysis the contention must rest upon the proposition that there is such absolute want of relation between the power of government to regulate the right of the citizen to seek a nomination for a public office and its authority to regulate the election after nomination, that a paramount government authority having the right to regulate the latter is without any power as to the former. The influence of who is nominated for elective office upon the result of the election to fill that office is so known of all men that the proposition may be left to destroy itself by its own statement.
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> Moreover, the proposition, impliedly at least, excludes from view the fact that the powers conferred upon Congress by the Constitution carry with them the right "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers" . . . and in doing so virtually disregards the previous legislative history and the decisions of this court sanctioning the same, to which we have referred, since that practice and those decisions unmistakably recognize that the power under the clause in question extends to all the prerequisite and appropriate incidents necessary to the discharge of the authority given.

The Chief Justice then referred to the debates on the proposed 17th Amendment in the 61st and 62nd Congresses and said:

> When the plain purpose of the Amendment is thus seen, and it is borne in mind that, at the time it was pending, the amendment to the Corrupt Practices Act, dealing with state primaries for nominating United States Senators, which is now before us, was in the process of consideration in Congress, and when it is further remembered that, after the passage of the Amendment, Congress enacted legislation so that the Amendment might be applied to state senatorial primaries, there would seem to be an end to all doubt as to the power of Congress.

The Chief Justice said it was true that the plenary reservation in Congress of the power to control the states in the exercise of the authority to deal with the times, places and manner of electing Senators and Representatives, as originally expressed in the Constitution, caused much perturbation in the conventions of the several states which were called upon to consider ratification, resulting from the fear that such power to regulate might be extended to and embrace the regulation of the election of the members of the state legis-

latures who were to exercise the power to elect Senators, and said:

> But this only served to emphasize the distinction between the state and Federal power, and affords no ground at this late day for saying that the reserved state power has absorbed and renders impossible of exercise the authority of Congress to regulate the Federal power concerning the election of United States Senators, submitted, to the extent provided, to the authority of the states, upon the express condition that such authority should be subordinate to and controlled by congressional regulation.
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> Can any other conclusion be upheld except upon the theory that the phantoms of attenuated and unfounded doubts concerning the meaning of the Constitution, which have long perished, may now be revived for the purpose of depriving Congress of the right to exert a power essential to its existence, and this in the face of the fact that the only basis for the doubts which arose in the beginning (the election of Senators by the state legislatures) has been completely removed by the 17th Amendment? . . .
>
> The consequence to result from a denial to Congress of the right to regulate is so aptly illustrated by the case in hand that, in leaving the question, I refer to it. Thus, it is stated and not denied that, in the state primary in question, one of the candidates, as permitted by the state law, propounded himself at the primary election as the candidate for the nomination for Senator of both the Republican and the Democratic parties. If the candidacy had been successful as to both, the subsequent election would have been reduced to the merest form.
>
> In view, then, of the plain text of the Constitution, of the power exerted under it from the beginning, of the action of Congress in its legislation, and of the amendment to the Constitution, as well as of the legislative action of substantially the larger portion of the states, I can see no reason for now denying the power of Congress to regulate a subject which, from its very nature, inheres in and is concerned with the election of Senators of the United States, as provided by the Constitution.

The opinion then quoted the following instruction given on the trial:

> If you are satisfied from the evidence that the defendant, Truman H. Newberry, at or about the time that he became a candidate for United States Senator, was informed and knew that his campaign for the nomination and election would require the expenditure and use of more money than is permitted by law, and with such knowledge became a candidate, and thereafter by advice, by conduct, by his acts, by his direction, by his counsel, or by his procurement he actively participated and took part in the expenditure and use of an excessive sum of money—of an unlawful sum of money—you will be warranted in finding that he did violate this statute known as the Corrupt Practices Act.

The Chief Justice held the giving of that instruction was error:

> I see no escape from the conclusion that the instruction . . . was in clear conflict with the text of the statute, and was necessarily of a seriously prejudicial nature, since in substance it announced the doctrine that, under the statute, although a candidate for the office of Senator might not have contributed a cent to the campaign, or caused others to do so, he nevertheless was guilty if he became a candidate or continued as such after acquiring knowledge that more than $3,750 had been contributed and was being expended in the campaign. The error in the instruction plainly resulted from a failure to distinguish between the subject with which the statute dealt—contributions and expenditures made or caused to be made by the candidate—and campaign contributions and expenditures not so made or caused to be made, and therefore not within the statute.
>
> There can be no doubt when the limitations as to expenditure which the statute imposed are considered in the light of its context and its genesis, that its prohibitions on that subject were intended not to restrict the right of the citizen to contribute to a campaign, but to prohibit the candidate from contributing and expending, or causing to be contributed and expended, to secure his nomination and election, a larger amount than the sum limited as provided in the statute. To treat the candidacy, as did the charge of the court, as being necessarily the cause, without more, of the contribution of the citizen to the campaign, was therefore to confound things which were wholly different, to the frustration of the very object and purpose of the statute. To illustrate: Under the instruction given, in every case where, to the knowledge of the candidate, a sum in excess of the amount limited by the statute was contributed by citizens to the campaign, the candidate, if he failed to withdraw, would be subject to criminal prosecution and punishment. So, also, contributions by citizens to the expenses of the campaign, if only knowledge could be brought home to them that the aggregate of such contributions would exceed the limit of the statute, would, bring them, as illustrated by this case, within the conspiracy statute, and accordingly subject to prosecution. Under this view the greater the public service, and the higher the character, of the candidate, giving rise to a correspondingly complete and self-sacrificing support by the electorate to his candidacy, the more inevitably would criminality and infamous punishment result both to the candidate and to the citizen who contributed . . .
>
> For the reasons stated, although I dissent from the ruling of the court as to the unconstitutionality of the act of Congress, I nevertheless think its judgment of reversal should be adopted, qualified, however, so as to reserve the right to a new trial.

Mr. Justice Pitney filed a separate opinion concurring in the judgment reversing the cause but upon grounds stated in the opinion to be fundamentally different from those adopted by the majority, his opinion being that there was no constitutional infirmity in the Act of Congress, but that there was an error in the submission of the case to the jury that called for a new trial. The opinion reviewed the Federal Court Practice Act, the 17th Amendment, the Michigan statute limiting the expenditures on behalf of a candidate and cited Sec. 4 of Art. 1 of the Constitution conferring power upon Congress to regulate "the manner of holding elections for Senators and Representatives." Justice Pitney considered it erroneous to treat the question as dependent upon the words of Section 4 alone and therefore viewed it in connection with Secs. 1, 2, 3 (as superseded by the 17th Amendment) and Sec. 6 of Article 1, and said:

> It is contended that Congress has no power to regulate the amount of money that may be expended by a candidate to secure his being named in the primary election; that the power "to regulate the manner of holding elections," etc., relates solely to the general elections where Senators or Representatives are finally chosen. Why should "the manner of holding elections" be so narrowly construed? An election is the choosing of a person by vote to fill a public office. In the nature of things it is a complex process, involving some examination of the qualifications of those from whom the choice is to be made and of those by whom it is to be made; some opportunity for the electors to consider and canvass the claims of the eligibles; and some method of narrowing the choice by eliminating candidates until one finally secures a majority, or at least a plurality, of the votes . . . But, in the essential sense, a sense that fairly comports with the object and purpose of a Constitution such as ours, which deals in broad outline with matters of substance, and is remarkable for succinct and pithy modes of expression, all of the various processes above indicated fall fairly within the definition of "the manner of holding elections." This is not giving to the word "elections" a significance different from that which it bore when the Constitution was adopted, but is simply recognizing a content that of necessity always inhered in it . . .
>
> It is said that Sec. 4 of Art. 1 does not confer a general power to regulate elections, but only to regulate "the manner of holding" them. But this can mean nothing less than the entire mode of procedure—the essence, not merely the form, of conducting the elections. The only specific grant of power over the subject contained in the Constitution is contained in that section; and the power is conferred primarily upon the legislatures of the several states, but subject to revision and modification by Congress. If the preliminary processes of such an elec-

tion are to be treated as something so separate from the final choice that they are not within the power of Congress under this provision, they are for the same reason not within the power of the states; and, if there is no other grant of power, they must perforce remain wholly unregulated . . . This would render the government of the United States something less than supreme in the exercise of its own appropriate powers,—a doctrine supposed to have been laid at rest forever by the decisions of this court in McCulloch v. Maryland, 4 Wheat. 316, . . . Cohen v. Virginia, 6 Wheat. 264, . . . and many other decisions in the time of Chief Justice Marshall and since.

But why should the primary election (or nominating convention) and the final election be treated as things so separate and apart as not to be both included in Sec. 4 of Art. 1? The former has no reason for existence, no function to perform, except as a preparation for the latter; and the latter has been found by experience in many states impossible of orderly and successful accomplishment without the former.

Why should this provision of the Constitution—so vital to the very structure of the government—be so narrowly construed? It is said primaries were unknown when the Constitution was adopted. So were the steam railway and the electric telegraph. But the authority of Congress to regulate commerce among the several states was extended over these instrumentalities, because it was recognized that the manner of conducting the commerce was not essential. And this court was prompt to recognize that a transportation of merchandise, incidentally interrupted for a temporary purpose, or proceeding under successive bills of lading or means of transport, some operating wholly intrastate, was none the less interstate commerce, if such commerce was the practical and essential result of all that was done . . .

Why is it more difficult to recognize the integral relation of the several steps in the process of election?

The learned Justice declared that the suggestion that if it appeared that one chosen to the Senate had secured his election through bribery and corruption at the nominating primary, he might be refused admittance, "involves a fundamental error of reasoning." He said:

> The power to judge of the elections and qualifications of its members, inhering in each House, by virtue of Sec. 5 of Art. 1, is an important power, essential in our system to the proper organization of an elective body of representatives. But it is a power to *judge*, to determine upon reasonable consideration of pertinent matters of fact according to established principles and rules of law; not to pass an arbitrary edict of exclusion. And I am unable to see how, in right reason, it can be held that one of the Houses of Congress, in the just exercise of its power, may exclude an elected member for securing by bribery his nomination at the primary, if the regulation by law of his conduct at the primary is beyond the constitutional power of Congress itself. Moreover, the power of each House, even if it might rightfully be applied to exclude a member in the case suggested, is not an adequate check upon bribery, corruption and other irregularities in the primary elections. It can impose no penal consequences upon the offender; when affirmatively exercised it leaves the constituency for the time without proper representation; it may exclude one improperly elected, but furnishes no rule for the future by which the selection of a fit representative may be assured; and it is exerted at the will of but a single House, not by Congress as a law-making body. . . .
>
> But if I am wrong thus far,—if the word "elections" in Art. 1, Sec. 4, of the Constitution, must be narrowly confined to the single and definitive step described as an election at the time that instrument was adopted,— nevertheless it seems to me too clear for discussion that primary elections and nominating conventions are so closely related to the final election, and their proper regulation so essential to effective regulation of the latter, so vital to representative government, that power to regulate them is within the general authority of Congress . . . As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made. Hence, the authority of Congress to regulate the primary elections and nominating conventions arises, of necessity, not from any indefinite or implied grant of power, but from one clearly expressed in the Constitution itself (Art. 1, Sec. 8, Cl. 18),—"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." This is the power preservative of all others, and essential for adding vitality to the framework of the government. Among the primary powers to be carried into effect is the power to legislate through a Congress consisting of a Senate and House of Representatives chosen by the people,—in short, the power to maintain a law-making body representative in its character. Another is the specific power to regulate the "manner of holding elections for Senators and Representatives," . . . and if this does not in literal terms extend to nominating proceedings intimately related to the election itself, it certainly does not, in terms or by implication, exclude Federal control of those proceedings. From a grant to the states of power to regulate the principal matter, expressly made subject to revision and alteration by the Congress, it is impossible to imply a grant to the states of regulatory authority over accessory matters exclusive of the Congress. And it is obvious that if clause 18 adds nothing to the content of the other express powers, when these are literally interpreted, it has no efficacy whatever, and must be treated as surplusage. It has not, heretofore, been so regarded.

Mr. Justice Pitney then refers to the opinions of Chief Justice Marshall in McCulloch v. Maryland (4 Wheat. 316), where he pointed out: "1st. The clause is placed among the powers of Congress, not among the limitations on those powers. 2nd. Its terms purport to enlarge, not to diminish, the powers vested in the government. It purports to be an additional power, not a restriction on those already granted:"

> According to the conclusive reasoning adopted in that case, whatever meaning may be attributed to Sec. 4 of Art. 1, there is added by clause 18 of Sec. 8 everything necessary or proper for carrying it into execution,—which means, into practical and complete effect.

The learned Justice therefore concludes that the passage of the Act under consideration amounts to a determination by a law-making body that the regulation of primary elections and nominating conventions is necessary if the Senate and House are to be representatives of the people, and that the question of the authority of Congress to determine that laws regulating primary elections are "necessary and proper for carrying into execution" the other powers specified admits of but one answer—the same given by Chief Justice Marshall in the case above cited, where he said:

> We think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. *Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.*"

Space is not available to follow the learned Justice in the masterly way in which he cumulates the great cases in which the doctrines of these italicized words of Marshall have been applied to render effective powers of government not expressly enumerated, but necessarily implied, but we ought not to omit these earnest words:

> It would be tragic if that provision of the Constitution which has proved the sure defense of every outpost of national power should fail to safeguard the very foundation of the citadel.

Upon the errors assigned in the conduct of the trial the learned Justice declares that there was not, in his opinion, any error in refusing to direct a verdict for the defendants, nor in instructing them that the

statute prohibited a candidate from excessive expenditure of money contributed by others, nor in instructing them that it was not necessary that the government should show that the defendants knew that some statute forbade the acts they were contemplating. He did, however, find prejudicial error in the part of the charge which required the jury to find the defendants guilty if they merely contemplated a campaign requiring an expenditure beyond the statutory limit, even if the defendant Newberry had and contemplated no part in such expenditures beyond the mere fact of standing as a candidate knowing that moneys voluntarily contributed by others without his procurement or participation were to be expended. The effect of such an instruction he declared to be highly prejudicial.

Mr. Justice Brandeis and Mr. Justice Clarke concurred in this opinion.

The case was argued by Mr. Charles E. Hughes for the defendants below and by Solicitor General Frierson and Special Assistant Attorney General Dailey for the Government.

(b) Homicide, Self Defense, duty to retreat.

Brown v. United States. Adv. Ops. p. 618.

Brown was convicted in the District Court, so. dist., of Texas, of murder in the second degree committed on one Hermis, at a place in Texas within the exclusive jurisdiction of the United States, the judgment was affirmed by the Circuit Court of Appeals, fifth circuit and the Supreme Court allowed a writ of certiorari. Hermis had twice assaulted Brown with a knife and had subsequently threatened that the next time one of them would "go off in a black box." These threats were communicated to Brown who thereupon put a pistol in his coat pocket. On the day in question Hermis was driven up in a cart to the place where Brown was superintending excavations for a post office. Brown told the driver that certain earth was not to be removed, whereupon Hermis came towards him with a knife. Brown retreated some 20 or 25 feet to where he had left his coat and got his pistol. Hermis was striking at him and Brown fired four shots and killed him.

The trial judge instructed the jury among other things that

> It is necessary to remember, in considering the question of self defense, that the party assaulted is always under the obligation to retreat so long as retreat is open to him, providing that he can do so without subjecting himself to the danger of death or great bodily harm.

This instruction was reinforced by one of similar import and the trial judge refused an instruction that

> If the defendant had reasonable grounds of apprehension that he was in danger of losing his life or of suffering serious bodily harm . . he was not bound to retreat.

Mr. Justice Holmes delivered the opinion of the court and after reviewing the facts and the instructions he said:

> So the question is brought out with sufficient clearness whether the formula laid down by the court, and often repeated by the ancient law, is adequate to the protection of the defendant's rights.

The student of the evolution of law would be repaid by a study of that part of the opinion, and of the cases therein cited, where concrete cases are declared to have had

> a tendency to ossify into specific rules without much regard for reason.

The learned Justice challenges the ancient sayings with these statements;

> Rationally, the failure to retreat is a circumstance to be considered with all others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt . . . Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant, he may stand his ground, and that if he kills him, he has not exceeded the bounds of self defense. That has been the decision of this court. Beard v. United States, 158 U. S. 550, 559 . . . Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore, in this court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety, or to disable his assailant rather than to kill him.

The learned justice states the contention of the government and marshalls the testimony which supports it. Space is lacking to discuss that branch of the case here. The ground of the judgment of reversal was the error in the instructions.

Mr. Justice Pitney and Mr. Justice Clarke dissented, but filed no dissenting opinion.

The case was argued by Messrs. James R. Dougherty and E. C. Brandenberg for the petitioner and by Assistant Attorney General Stewart for the government.

The opinion cannot fail to have a profound influence on the law of self defense, the duty of retreat and the right to stand one's ground.

(c) Bribery of Federal Official.

Krichman v. United States, Adv. Ops. 616.

Krichman, a railroad porter of the Pennsylvania Railroad, was indicted and convicted of accepting a bribe for the delivery of trunks, after the railroads had been taken possession of by the President and while the transportation systems of the country were being operated and administered by the Director General of Railroads. The indictment charged that the porter was "acting for or on behalf of the United States in an official function" by authority of the department of the Director General of Railroads. The judgment was affirmed by the circuit court of appeals for the second circuit, Judge Ward dissenting. The case came before the Supreme Court by certiorari.

Mr. Justice Day, delivering the opinion of the court declared that the interpretation given to the statute by the courts below practically recast the statute,

> from one embracing official, and those discharging official functions, into one including every person discharging any sort of duty while the government is in control of the work.

This, he said, could only be done by amendment of the statute by congress. Referring to the admission of the government that the statute was ambiguous, the learned justice said:

> While criminal statutes are to be given a reasonable construction, ambiguities are not to be solved so as to embrace offenses not clearly within the law. We are unable to remedy the uncertainties of this statute by attributing to Congress an intention to include a baggage porter with those who discharge official duties in the operation of a railroad controlled by an officer of the government.

The judgment of the Circuit Court of Appeals was accordingly reversed. The case was argued by

Mr. Edward Schom for the petitioner and by Mr. W. C. Herron for the Government.

States—Controversies Between

People of the State of New York vs. People of State of New Jersey, Adv. Ops., p. 544.

This is another of that series of great cases which has come to the Supreme Court of the United States by virtue of seven words in the first clause of Paragraph 2 of Article III of the Constitution declaring that the judicial power shall extend "to controversies between two or more states." These seven words not only made possible the adoption of the Constitution but have proved to be sufficient foundation without further legislation on which to build a judicial system which has effectually substituted justice for force in controversies between the sovereign states which united to form our nation. The gravity of the controversy in this particular case, the method by which it was reconciled and the inevitable consequences which would have ensued if there had been no judicial forum to which it could have been submitted, appear, from an examination of the facts.

The people of the State of New York filed a bill to enjoin the State of New Jersey from discharging a large volume of sewage into the upper bay of the New York harbor on the ground that such pollution would be a public nuisance and would result in grave injury to the health, property and commercial welfare of the people. The action sought to be enjoined was the consummation of a plan adopted by the State of New Jersey for the solution of a difficult and critical problem for the disposition of the sewage of the Passaic River Valley, which river rises in the northeast part of New Jersey and empties into Newark Bay. The watershed of this river contained a population of about 700,000 in 1911 and it was estimated that it would be more than a million and a half in 1940, to which year it was planned to furnish adequate sewerage capacity. The growth of population in this valley had brought about a condition of pollution of the water, which was a menace to the health and property of adjacent communities. The Governor of New Jersey accordingly appointed three successive commissions to study the situation and provide a remedy. The plan finally adopted by the commissioners and approved by the State Legislature provided for a main intercepting sewer extending from the City of Paterson along the right bank of the Passaic River to a point in the City of Newark, and thence by a tunnel under the waters of Newark Bay about 500 feet north of Robbins reef light, where it was proposed to discharge the sewage at a depth of 40 feet of water below mean low tide. The Act which approved the plan provided that before the sewer should be constructed a further investigation should be made by the commissioners whether the discharge of sewage into New York Bay would be likely to pollute its waters to such an extent as to cause a nuisance to persons or property within the State of New York. Such investigation was made, and a report of the commissioners was presented to the Governor, who thereupon concluded that the plan would not cause a nuisance to persons or property within the neighboring state, and the Attorney General of New Jersey also advised the Governor that in his opinion the State of New York could have no valid objection to the use of the sewer as proposed. At this juncture the Legislature of New York passed an Act providing for a commission to investigate the probable effect upon the waters of New York Bay of the execution of this plan, with power to cooperate with the authorities of New York in arriving at some mutually satisfactory solution of the problem. Various conferences were held, but no mutually satisfactory course of action was arrived at, with the result that in October, 1908, this suit for an injunction was commenced by the State of New York.

The opinion of the court was delivered by Mr. Justice Clark, who brushed aside that part of the evidence and argument in regard to the establishment by compact between the two states of the boundary line, and the jurisdiction over the adjacent waters, and said:

> But we need not inquire curiously as to the rights of the state of New York, derived from this compact, for, wholly aside from it, and regardless of the precise location of the boundary line, the right of the state to maintain such a suit as is stated in the bill is very clear. The health, comfort and prosperity of the people of the state and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants, the state is the proper party to represent and defend such rights by resort to the remedy of an original suit in this court, under the provisions of the Constitution of the United States. Missouri v. Illinois, 180 U. S. 208, 241, 243.

It was next held that the sewerage commissioners constituted such a statutory corporate agency of the state that their action, actual or intended, must be treated as that of the state itself. The bill and answer set up at length the details of the plan and the contention of the parties as to the method in which it would operate, the State of New York alleging that pollution of the water would render it unfit for bathing or for purposes of commerce, injurious to vessels using the waters, and poisonous to the fish and oysters subsisting within it; the State of New Jersey alleging that the plan was approved by sanitary engineers of the highest professional standing and experience and that, upon the authority of their studies, it had been shown that there would be no greater pollution of the water of New York Bay than that which existed under the prior conditions, and that on the whole the execution of this plan would not only afford greatly needed relief to the inhabitants of the State of New Jersey, but that it would improve conditions in New York Bay.

The United States Government intervened in this proceeding by leave of court:

> The warrant assigned for this intervention was the power and duty of the government with respect to navigation and interstate commerce, and the inherent power which it has to act for the protection of the health of government officials and employes at the Brooklyn Navy Yard, and its duty to protect from damage the government property bordering upon New York bay.

The intervening petition averred that the plan would result in filling up and shoaling the channels of the bay, that the proposed method of purification was insufficient, that there were other better and more advanced methods of sewage disposal than this proposed, and for these reasons the Government joined in the prayer for relief.

As a result of this intervention and conferences between the Government and the sewerage commissioners a method of treatment of the sewage was decided upon and embodied in a stipulation between the United States, acting through its attorney general, and the sewerage commissioners acting under authority of the New Jersey legislature. The stipulation provided for the treatment of sewage in the Newark meadows before it passed into the bay, by screening and sedimentation and the discharge of the purified effluent at a depth of not less than 40 feet beneath the surface of the water at low tide through 150 outlets distributed

over an area of three and a half acres. The stipulation also provided not only for the adoption of the then best known method of screening sedimentation and dispersion through deeply submerged multiple outlets, but provided also that at all times the system should be so maintained that there would be in the waters of New York Bay no visible suspended particles coming from the sewer, no deposits caused by it, objectionable to the Secretary of War, no odors from organic matter, no increase of color, no injury to the public health, no public or private nuisance, no injury to the property of the United States and no reduction of the dissolved oxygen content of the waters, due to this sewage, sufficient to interfere with major fish life, and in regard to this stipulation the opinion says:

> It is obvious that if the conditions of this stipulation are realized and maintained, there will be no occasion or ground for such an injunction as was prayed for.

On behalf of the State of New York, expert witnesses testified that even the comprehensive and minute provisions of the stipulation for screening, purifying and dispersing the sewage would not be effective. Equally well informed and creditable witnesses for the defendants controverted these views and the conclusions of the defendant's witnesses were declared by the opinion to be strongly supported by the probabilities.

It was also argued that the stipulation was not binding upon the State of New York because executed only by the sewerage commissioners and that it was invalid for want of power in the attorney general to so stipulate on behalf of the United States, but the opinion declares that since the sewerage commissioners acted under the authority of the legislature of the State of New Jersey and since the special counsel of the State of New Jersey had entered the approval and consent of the state to the stipulation, it must be regarded as the valid obligation of the state as well as of the commissioners. Regarding the United States the opinion declared:

> Having regard to the large powers of the government over navigation and commerce, its right to protect adjacent public property and its officers and employes from damage and disease, and to the duty and authority of the Attorney General to control and conduct litigation to which the government may be a party (R. S. 359, 367), we cannot doubt that the intervention of the government was proper in this case, and that it was within the authority of the Attorney General to agree that the United States should retire from the case upon the terms stated in the stipulation, which were plainly approved by the Secretary of War, who afterwards embodied them in the construction permit issued to the Sewerage Com'rs.

After the filing of this stipulation the Government withdrew from the case, but the remaining parties took a great volume of testimony, which was concluded in June, 1913. The case was not reached for argument in the Supreme Court of the United States until the October term of 1918, and, on account of the time which had elapsed since the taking of testimony was closed and the rapid advance in sanitary science then in progress, the Court of its own motion directed that additional testimony should be taken in order that the Court might be advised:

> (1) As to any practicable modification of the proposed sewer system which might improve it and reduce any polluting effect upon the water which might be caused by the effluent to be discharged; (2) as to any practicable plan or arrangement for sewage disposal which would lessen the polluting effect derived from the New York city sewage; (3) and as to the present degree of pollution of the waters of New York harbor, and the change in this respect since the taking of the testimony was closed.

In compliance with this order much additional testimony was taken. Calling attention to the ruling that the burden on the State of New York to sustain the allegation of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties, the opinion said:

> Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude, and it must be established by clear and convincing evidence.

The opinion thereupon proceeds to review and analyze the testimony presented by the expert witnesses on each side, and comes to the conclusion that the complainants have failed to show by the convincing evidence which the law requires that the sewage which the defendants intended to discharge into upper New York Bay, treated in the manner specifically described in the stipulation, would so corrupt the waters of the bay as to create a public nuisance, and particular emphasis was laid on the proposition that a binding obligation had been entered into on the part of the defendants with the Government of the United States for the protection of the waters from pollution, if any appears. The prayer for injunction against the operation of the sewer was denied, and the learned Justice pronounced this salutary admonition:

> We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court, however constituted.

The relief was accordingly denied without prejudice to the institution of another suit for injunction, if the proposed sewer in operation should prove sufficiently injurious to require the interposition of the Court for the realization of that degree of protection to which the State of New York was entitled.

Taxation.—(a) Property and Franchises Engaged in Interstate Commerce

St. L. & E. St. L. Electric Ry. Co. v. State of Missouri ex rel., Adv. Ops., p. 552.

The plaintiff in error (hereinafter called the Bridge Company) had acquired by contract the exclusive right to operate an electric street railway over the Eads bridge which spanned the Mississippi River between the cities of St. Louis, Mo., and E. St. Louis, Ill. It also had valuable operating contracts with electric railroad systems respectively in the States of Illinois and Missouri. The taxing authorities of the State of Missouri, in accordance with the operation of the "unit rule" applied to all railroads, valued the property of the Bridge Company at a little over half a million dollars. Of this amount, after deducting the value of the tangible property, there remained an excess of $173,000 and this item was recorded on the books as "all other property." The Bridge Company refused to pay a tax levy on this item. Suit was brought in the State Court, the tax was sustained by all the courts of the State of Missouri, and the Bridge Company brought the case to the Supreme Court of the United States by writ of error. The only question there argued was that the tax was invalid because, if allowed, it would constitute a direct and unconstitutional burden on interstate commerce.

Mr. Justice Clarke delivered the opinion of the Court. Referring to A. & P. Tel. Co. v. Philadelphia (190 U. S. 160), as a controlling authority frequently

approved by the Court, he restated the doctrine of that case as follows:

> While a state may not, in the guise of taxation, constitutionally compel a corporation to pay for the privilege of engaging in interstate commerce, yet this immunity does not prevent the state from imposing an ordinary property tax upon property having a situs within its territory and employed in interstate commerce. Even the franchise of a corporation, if not derived from the United States, although that franchise is the business of interstate commerce, is subject to state taxation as a part of its property.

The application of this principle to the stipulated facts of the case was thus announced:

> We cannot doubt that the contracts we have described, which very plainly gave to this short line of railway much of the value as a going concern which led the company to bond and capitalize it at $1,000,000, and the board to value it at approximately one-half that amount, must have been taken into consideration by the board, and that, therefore, the contention that the tax was levied exclusively upon the franchise to do an interstate business is not sound, and must be rejected.

The judgment of the Supreme Court of Missouri was therefore affirmed. Mr. Joseph S. Clark argued the case for the Bridge Company and Mr. Thomas G. Rutledge for the state taxing authorities.

Taxation.—(b) Federal Estate Tax, Deduction of State Inheritance Taxes.

New York Trust Co. v. *Eisner,* Adv. Ops. 620.

The Executors of one Purdy brought suit in the U. S. District Court, Southern District of New York to recover $23,910.77 which they were compelled to pay as a Federal estate tax. They had previously been compelled to pay $37,769.88 inheritance and succession taxes under the laws of New York and other states. In computing the value of the estate subject to the Federal estate tax, no deduction was made on account of the payment of said state inheritance taxes. The executors claimed first, that the act of Congress was unconstitutional and the entire tax void, and second, that it was misconstrued in not allowing deduction of said state taxes as a charge against the estate within the meaning of Sec. 203 of the Act. The district court dismissed the case on demurrer and the case was brought before the Supreme Court by writ of error.

Mr. Justice Holmes delivered the opinion of the court. In regard to the first point he said:

> The statement of the constitutional objections urged, imports on its face a distinction that, if correct, evidently hitherto has escaped this court. See United States v. Field (Adv. Ops. 335).

The gentle irony of this statement is not apparent until one turns to the citation and observes that distinguished counsel in an important case involving the same act, saw fit not to present any constitutional objection to it.

The learned justice states the constitutional objection as follows:

> It is admitted, as since Knowlton v. Moore, 178 U. S. 41 it has to be, that the United States has power to tax legacies, but it is said that this tax is cast upon a transfer while it is being effectuated by the state itself and therefore is an intrusion upon its processes.

In reply to the argument attempted to be drawn by analogy from the distinction drawn between state taxes unlawfully attempted to be levied on the subject matter of commerce among the states, and those rightfully imposed after the goods have been commingled with the general stock in the state, he said:

> A consideration of the parallel is enough to detect the fallacy. A tax . . . directed solely against goods imported into the state . . . determined by the fact of importation, would be no better after the goods were at rest in the state than before . . . Conversely, if a tax on the property distributed by the laws of a state, determined by the fact that distribution has been accomplished, is valid, a tax determined by the fact that distribution is about to begin, is no greater interference and is equally good.

Reviewing the decision in Knowlton v. Moore, and laying particular emphasis on the historical point of view on which that decision was largely based he characteristically remarked:

> Upon this point a page of history is worth a volume of logic.

He declared that case to be conclusive on all the constitutional objections here urged and on the authority of that case held them not well taken.

In regard to the second point the pertinent provisions of Sec. 203 were as follows:

> That for the purpose of the tax the value of the net estate shall be determined . . . by deducting from the value of the gross estate . . . (here follows an enumeration of specific deductions) . . . *and such other charges against the estate* as are allowed by the laws of the jurisdiction.

The precise question therefore was whether state inheritance taxes were such "other charges against the estate." On this point the learned justice said:

> "Charges against the estate" as pointed out by the court below, are only charges that effect the estate as a whole, and therefore do not include taxes on the right of individual beneficiaries. This reasoning excludes not only the New York succession tax, but those paid to other states which can stand no better than that paid in New York. What amount New York may take as the basis of taxation, and questions of priority between the United States and the state, are not open in this case.

The judgment of the district court dismissing the suit was affirmed.

This paragraph manifestly takes for granted that the New York succession tax is a tax upon the interests of the individual distributees and not upon the estate itself. In another column a correspondent calls attention to cases indicating that there is confusion and uncertainty on this point, (citing Northern Trust Co. v. Lederer, 262 Fed 252 and Prentiss v. Eisner, 267 Fed 19). This situation is an interesting one and will undoubtedly be brought before the courts for solution in the near future. This will involve first a decision of the court of last resort of the State Court as to the nature and object of the state inheritance tax, and the interpretation of the words

> such other charges against the estate *as are allowed by the laws of the jurisdiction.*

The words italicised seem to have escaped the attention of court and counsel alike.

If the highest court of the state should decide that the state inheritance tax was a charge against the entire estate, and that it was allowable as such by the state law, the Supreme Court of the United States would in perfect harmony with the logic of the instant case, reach, on such different facts, an opposite but consistent conclusion.

The case was argued by Mr. George Sutherland for the executors of the estate, by Solicitor General Frierson for the government, by Mr. John G. Gleason for the Comptroller of New York (by special leave) and by Mr. J. Weston Allen, Attorney General of Massachusetts as amicus curiae.

NEW SYSTEM OF CIVIL PRACTICE IN NEW YORK

First Comprehensive Revision of Practice Provisions Since 1876 Makes Some Important and Minor Changes to Simplify and Liberalize Procedural Methods

By HARRY M. INGRAM
Of the Potsdam (N. Y.) Bar

PRACTICE in civil actions and proceedings in New York State after the first day of October, 1921, will be carried on under a new Civil Practice Act and a new set of Court Rules. Thus will come into being the first comprehensive revision of practice provisions which has been had in this state since the adoption of the old Code of Civil Procedure in 1876. This accomplishment, in very large measure, is due to the continuous agitation carried on for years in the New York State Bar Association at its annual meetings and through its various general and special committees on reform in law and practice.

The new Civil Practice Act was passed by the Legislature at the session of 1920, but not without objection from a large number of the active members of the bar. By many lawyers any change in practice whatever was frowned on, while to others the idea of repealing the Code of Civil Procedure which had been their constant guide and stay since their earliest days at the bar was utterly abhorrent. In fact, it was only after an intense struggle on the part of the friends of a more liberal practice that the new system adopted in 1920 was not repealed in 1921.

The first complete plan for a new system of practice was suggested by the Board of Statutory Consolidation in 1915 after several years of serious and thoughtful study of the whole subject.[1] The Board's plan contemplated a brief practice act of less than one hundred sections, four hundred practice rules and the transfer of a great mass of existing provisions to the consolidated laws. After its presentation to the Legislature this plan was given wide attention by the bar of the state. A Joint Legislative Committee comprising members of both branches of the state Legislature was created to examine into the report of the board and report its conclusions.[2] This Committee held hearings throughout the state, sought the advice and suggestions of the bar and the judges of the courts and investigated the broad subject of practice revision from every possible viewpoint. The legislative committee was diligent and thorough in its efforts and, as a result of its labors, a plan carefully worked out in detail was finally prepared and presented to the Legislature and was adopted.

The Committee's work, although different in many respects from the Board's plan, nevertheless incorporated many of the recommendations made by the Board in its report, including the enactment of separate court acts, the arrangement of practice provisions according to the course of an action, a large number of the actual changes to be made in practice, and the suggestion of a convention of judges and lawyers to prepare rules of practice.

The plan which has been enacted embraces a new Civil Practice Act of 1578 sections, a Surrogate Court Act, a Justice Court Act, a Court of Claims Act, a New York City Court Act, and transfers to the consolidated laws a considerable number of provisions which it was believed should not be contained in any practice act. The Legislature, upon adopting the above acts, provided for a Convention to consist of judges and trial lawyers charged with the duty of formulating and adopting suitable rules of practice to supplement the statutory provisions. The Rules Convention held a number of sessions and the result of its deliberations, embracing something less than three hundred rules has been formally adopted and will become effective with the new practice acts on October first.[3]

Under the new act and rules substantial reforms have been accomplished in civil practice. The practice will be more convenient and much less technical and cumbersome. It was deemed expedient to retain much of the present system of practice. Whatever may be said against the Code of Civil Procedure, it embraced the provisions under which practice in our courts has been conducted for nearly a half century, hundreds of thousands of dollars and years of time and effort had been expended in litigation to settle the construction of much of its text, and it had become established through years of constant usage as probably no other statute or system in any other state or country. Practitioners will find, therefore, in their use of the new system, that the best of the old code has been kept as the basis of a large part of the new practice.

One of the features of the Civil Practice Act is the arrangement of its provisions in logical sequence according to the steps in an action. Thus, as every action is commenced by the service of a summons and pleadings designating the parties and the subject of the action, the procedure is arranged to follow closely the natural progress of the action through the making of the issue to be litigated, preparing for the trial, the trial itself, and the judgment. The review by appeal and the enforcement of the judgment follow and the last articles of the act set forth the provisions regulating costs and fees. Practice affecting certain particular actions and proceedings is kept together, such as practice in ejectment and partition actions, foreclosure of mortgages, matrimonial actions, proceedings to obtain what, under the former practice, were known as "state writs," and proceedings dealing with the affairs of infants and incompetent persons. The purpose underlying this arrangement was to secure a convenient and workable classification of material, so that one might turn, even without reference to an index, to any subject of practice, and in

1. Membership of Board of Statutory Consolidation in 1915: Adolph J. Rodenbeck, Rochester. Chairman; John G. Milburn, New York; Adelbert Moot, Buffalo; Charles A. Collin, New York. Secretary. Frederick E. Wadhams, Albany.

2 Membership of Joint Legislative Committee from 1915 to 1920 included Senator J. Henry Walters, Syracuse, Chairman, succeeded as Chairman by Senator Charles W. Walton, Kingston; Senators Charles D. Newton, John Knight, James A. Foley, William B. Carswell; Assemblymen August C. Flamman, Abram Ellenbogen, Alexander Taylor, Frank Aranow, William S. Evans, Eliot Tuckerman, Thomas F. Curley, Caesar B. F. Barra.

3 Chairman of Rules Convention, Justice Alfred R. Page, New York; Secretary, Herbert L. Smith, Syracuse.

that place find all of the general provisions pertaining to such subject.

Many important changes in practice are made. One of the greatest objections to the old code was that should an attorney for a party err in the course of an action, ask for the wrong relief in his papers, commence the action in the wrong court, or should there be some other mistake, defect or irregularity, the innocent client was often thrown out of court and if he desired to proceed again, he was compelled to begin anew. In many cases the client thus was subjected to long delays and much additional and useless expense. He was penalized for his lawyer's mistake. The new practice takes care of these troublesome situations by a number of broad provisions giving to the court the power to correct the error or to supply the omission with the least possible trouble and expense to the party. Under the new act it is intended that the litigant shall have his day in court and shall have his contention determined upon its merits notwithstanding the procedure.

Another change which will tend to simplify the practice, eliminate many unnecessary motions, and reduce the expense of litigation, is the permission to join in an action real and suspected parties in interest without penalizing the litigant for misjoinder or nonjoinder. One of the new sections provides that all persons may be joined as defendants against whom the right to any relief is said to exist, whether such persons are liable together, or each by himself, or where it is doubtful which, if any, is liable. Under the new practice each person who is sued need not be liable for the entire damages, but a judgment can be had against those who are liable and the extent to which each is interested. Broad provisions are included for adding new parties at any stage of the action as well as permitting the dropping of parties when it is shown they have no interest.

Many forms of process have been abolished in New York state during the past fifty years. Among these old forms there existed a great number of "writs" issued in the name of the people of the state. Prior to the new practice a number of these writs still remained, but with the exception of the writ of habeas corpus, they have now all been abolished and a mere order granted by a judge takes the place of each. To abolish the writ of habeas corpus might require a change in our state constitution. This writ is the great guarantee of liberty to one claiming to be unjustly held or imprisoned and because of its recognition by the constitution, and the place which it holds in the minds of all English-speaking people it has been retained without change.

Along with other forms abolished by the new act has gone the "demurrer." Objections to pleadings in point of law must be taken by motion for judgment.

Declaratory judgments are authorized in a section which gives to the supreme court power to declare rights and other legal relations on request for such declaration, whether or not further relief is or could be claimed, and such declaration is given the force of a final judgment. Under the rules adopted on this subject the courts may decline to pronounce a declaratory judgment in their discretion. Provision is made that such actions in matters of procedure shall follow the forms and practice prescribed for other actions.

The procedure for taking the testimony of parties and other persons by deposition is simplified greatly. Under the new practice it is necessary only to file a written notice stating the person before whom the testimony is to be taken, the time and place of the proposed examination, the name of the person to be examined and the nature of the issues. The examination follows as a matter of course unless the notice is vacated or modified on motion of the adverse party. A party may proceed by obtaining an order in the first instance, as under the old practice, instead of proceeding by notice in case he so desires.

Several new provisions give to a party additional rights to obtain discovery and inspection of papers, documents and other articles material to the action which are in the possession of his opponent. If a party has had possession at any time of any specific documents, he can be compelled to disclose when he parted with them and what has since become of them. These provisions are of importance in enabling a party properly to proceed with a trial and give him rights which often will simplify a trial and reduce its length.

The new act abolishes the distinction between "court orders" and "judge's orders," one of the fictions of procedure; provides that the appellate division when reversing a judgment or order shall specify the grounds for the reversal; makes more uniform the practice relating to orders of arrest, attachment and injunction; makes broad provision for the extension of time and for the consolidation and severance of actions; clarifies and simplifies the rules as to service of papers; and makes many other changes of greater or less importance.

Many details of practice which were a part of the old statutory code have been transferred to rules and no longer will be part of the statute law. The adoption of a comprehensive set of court rules, formulated in large part by the judges themselves, will of itself add greater flexibility to the practice and meet the demand for larger powers to be lodged in the courts in dealing with procedural details. In recommending an extension of court rules, the Joint Legislative Committee of the Legislature expressed the hope that the courts would interpret and construe all of the details of procedure in the light of the intent of the committee that procedure is only a means to secure a judicial determination upon the merits of the matters at issue in a litigation.

Now that a new practice system has been adopted in New York state after so many years of labor and investigation, it is believed that a minimum of statutory amendment will be required to meet new situations and follow the growth of the law. Perfection is not claimed by any of the advocates of the new act but it is felt that a pronounced step in advance has been taken in practice reform. An official edition of the new acts, accompanied by complete tables of source and distribution and an official index of all practice provisions whether contained in the new practice acts or in the consolidated laws, is being prepared by legislative authority.

The new practice act and rules do not go so far along the lines of radical readjustment of practice as some would prefer, but in a great state like the Empire State of New York, with all of its judicial machinery and practice methods so long established, with its various divisions of judicial authority, and with its vast and complex industrial and commercial life, the Legislature, in its wisdom, was unwilling to go further at this time in the matter of practice revision.

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THE ANNUAL MEETING

There is nothing more beneficial to the men of our profession than friendly counsel. If men who "strive mightily" did not "eat and drink as friends" their avocation would be a depressing one. It is only because the acerbities of a life of conflict are tempered by the amenities of social intercourse, between those whose constant duty and effort must be to encompass the downfall of an antagonist, that so much of sweetness and light marks the character of the lawyer.

The man whose high calling entitles him to the name of counselor, himself needs counsel. There are problems which can be solved in no other way than by exchange of views and the stimulation of thought which comes from discussion. The lawyer's interests cannot be protected without co-operation. The judicial organism cannot thrive, or grow to its proper stature, unless its faults be clearly defined and methods be devised for the better administration of justice. These things cannot be done effectually where two or three are gathered together. There must be the participation of the largest available numbers of men, from many different communities, and of all sorts and conditions.

The American Bar Association meetings fill these requirements. A study of the program printed on another page will disclose the fact that men distinguished in the profession will speak on topics of unusual interest and that important questions are on for discussion in which all may participate. And finally our brethren of the bar of the State of Ohio and of the City of Cincinnati are planning to extend unmeasured hospitality to the lawyers of the nation gathered there in annual assembly. Duty and pleasure unite in the call for a record-breaking attendance. Why should any of us stay away? Come on—Let's go!

A PREREQUISITE TO DISARMAMENT

The coming conference of the leading powers, on the subject of disarmament, is an event of supreme importance. The world is so fully convinced of the necessity for escape from the crushing financial burdens of the present system that there is no room for debate on the main proposition. There is, however, imperative need to consider when and how this greatly desired end may best be attained.

It can, of course, be brought about only by the accord of all the principal powers.

How is this accord to be secured? The indispensible unanimity cannot be expected unless the plan is sound, builded on secure foundations and the details so wrought out as to bring the conviction that it is profitable and safe for all concerned.

In this juncture there is an analogy that should be carefully studied. Disarmament of the individual has been brought about in every civilized land. How and where and on what terms has this been accomplished?

The first step was the conviction, born of long and bitter experience, that the settlement of controversies between individuals by resort to force, was not a satisfactory method. It is to be hoped that the world has reached the conviction that the settlement of controversies between nations by armed conflict, is an evil system. If not, little real progress can be made.

The second step in the disarmament of the individual was the creation of a substitute for force. This involved the recognition of indisputable principles of justice and the evolution of a judicial tribunal to declare and apply them. Not until this was accomplished was the individual willing to disarm.

How far has the world progressed in the establishment of recognized principles of justice between nations? The answer to this question requires more space than is here available, but we have the right to be assured that the world-war has destroyed certain evil doctrines and has established in their place concepts of world-justice such as the inviolability of treaties,

equality of right between small and great nations, the right of self determination, the negation of the right to acquire title to territory by military conquest and the incorporation into the colonial relation of those concepts which regulate the relation of guardian and ward, trustee and beneficiary. From a few fundamental principles it is easy to build up a sufficient body of law. It is not then a lack of law that impedes *"the substitution of processes of justice for the more primitive method of trial by combat."*

What progress has been made in the establishment of an international tribunal to apply principles of world-justice to controversies between nations? Although the government of the United States has not yet officially participated in it, a fair beginning has been made. The Permanent Court of International Justice, provided for by the Versailles treaty and formulated under the auspices of the League of Nations by distinguished jurists (among whom the American Bar was represented by Elihu Root), has now been approved by twenty-four nations. The British Empire, including Australia, Canada, India, New Zealand, South Africa and the United Kingdom, deposited its ratification with the Secretariat of the League of Nations, on the fourth day of the present month. Other ratifications already received are those of Albania, Austria, Denmark, Holland, Italy, Sweden and Switzerland. It has been officially reported that the ratifications of Bulgaria and Norway have been completed and are in the course of transmission. Ratification has also been voted by the French senate and chamber, the Polish diet, the Venezuelan congress and the Costa Rican legislature. Representatives of Belgium, Brazil, Japan and Spain have notified the Secretariat that their ratifications will be deposited before September, and China is only awaiting the verification of the official text. Ratification of the court of international justice is not limited to members of the League of Nations, and the question whether or not the United States should join with the other civilized nations of the world in ratifying this tribunal, ought not be made a party issue.

And this brings us to the application of our analogy. Since the individual man did not and would not disarm until justice came to supersede the rule of power and courts were evolved to administer private justice, can we hope that the nations of the world will agree upon any genuine and thorough-going disarmament until justice is recognized as the supreme rule in national relations and a satisfactory tribunal of international justice has been evolved?

It would be a disastrous thing to the cause of lasting world peace if the coming conference should prove to be merely a diplomatic game of give and take with selfish maneuvering for advantage instead of a real effort to find the basis for genuine disarmament. Ought we not therefore, without further delay, to join with the other civilized nations in the establishment of the Permanent Court of International Justice, as one of the fundamental prerequisites of real disarmament?

KANSAS INDUSTRIAL COURT

We print in this issue the last of the series of three articles on the Kansas Industrial Court. Both sides of the controversy as to the constitutionality of this notable experiment have been ably presented, and many of those who have followed the arguments have declared themselves deeply interested in this effort to find a judicial remedy for an age-long evil.

The Supreme Court of Kansas, in affirming commitments for contempt under the act, has sustained it against determined attack, and the final question of its validity is expected soon to come before the Federal Supreme Court.

The vital question, however, will not be decided by any court. It will not depend on any technicality of the law. It will be decided by an intelligent and informed public opinion which will judge the experiment by its works. If it develops a just solution of a hitherto unsolved problem, the function of the courts will merely be to require that its provisions shall not run counter to constitutional inhibitions. If it fails to operate satisfactorily, it will not endure, even though the highest court should declare that it did not contravene organic law.

CONTRIBUTIONS

The board of editors wish the members of the Association to feel that the JOURNAL is a forum in which every question of broad interest to the profession in general may be discussed. Articles and letters are welcomed and those who send them may be assured that they will receive prompt and careful attention.

Articles cannot always be published in the number following their acceptance. Those who send them, however, may rest assured that material which is found available will appear at the earliest possible date.

STATE ADMINISTRATIVE REORGANIZATION

What Has Been Done to Solve the Important Present-Day Problem of Making State Governments Simpler and More Efficient

By WALTER F. DODD*
Of the Chicago, Ill., Bar

STATE GOVERNMENTS have so increased the number and importance of the things they do, and the amount of their expenditures, that the problem of state administrative reorganization has become increasingly important in recent years. During the past ten years investigations of their present administrative systems have been made in more than one-third of the states, and a series of valuable reports has been published, summing up the results of these investigations. The two most important reports are that of the Illinois Efficiency and Economy Committee, published in 1915; and the report of the New York Reconstruction Commission, published in 1919.

The problems of state administrative reorganization are the most pressing ones in the field of state government, for the administrative organization is the permanent machinery for the purpose of doing the state's work, and through the executive department of state government the bulk of state expenditures is made. State governments in 1919 spent more than $600,000,000 and upon the efficiency of state government depends not only the work conducted directly by the state, but also to a very great extent the effectiveness with which large sums of money are spent by local governments within each of the states.

In practically all of our state governments there has developed a series of elective state officers, provided for by the constitution. In the earlier days of state development the tendency was to leave to legislative bodies the appointment of the more important officers of the state government. The office of governor soon became independent of the legislative bodies; and gradually, with the distrust of legislative power which arose partly from abuse of that power and partly from dissatisfaction with things upon which the people forced legislative action, there came a series of separately elective state officers. Up until about fifty years ago the functions of state government were few, and were conducted by a small group of officers, most of whom had become popularly elective. With the development of new needs in the field of state government there has been some tendency to provide by the constitutions themselves for additional administrative machinery; and when the constitutions have created new offices they have ordinarily provided for the popular election of persons to fill such offices. Illinois has five constitutional state offices in addition to the governor. Idaho has seven, and Nebraska has eight such offices in addition to the railroad commissioners who are provided for in the constitution and made elective, and six elective regents of the state university.

The number of constitutional state officers who are popularly elective could not easily be multiplied to an indefinite extent; and the increased importance of the constitutional state officers has in recent years come chiefly through the vesting in such officers by statute of additional powers and duties. It would have been possible to build up the complete state administration around the governor and the other elective state officers in the several states, through the vesting either in the governor or in some one of the other elective officers of all of the additional powers or functions which the legislatures desired should be conducted by the state government. Such a plan was actually contemplated by the Arkansas constitution of 1874 which provides that: "The General Assembly shall have no power to create any permanent state office not expressly provided for in this constitution"; and by the provision of the Nebraska constitution of 1875 that "No other executive state office shall be continued or created, and the duties now devolving on offices not provided for by this constitution shall be performed by the offices herein created." Neither of these provisions, however, operated to prevent the creation of offices other than those provided for by the constitution, and Nebraska in 1920 changed its constitutional provision so as to prohibit the creation of other state executive offices except by a two-thirds majority of all members elected to the two houses of the legislature.

As new needs have developed for state governmental activity, new offices have been created by statute. In a number of states the constitutions expressly deny an appointing power to the legislatures. A number of the state constitutions expressly provide for a certain amount of appointing power in the governor, by and with the advice and consent of the Senate; although the legislatures in many states are free to vest an appointing power in the governor either with or without the advice and consent of the Senate, or to provide for some other method of appointing to office. When new offices have been created by statute, however, the natural tendency has been to vest the power to fill such offices in the governor, usually with the approval of the Senate. With the rapid increase in the number of things that the state government has come to do in almost all of our states, this has resulted in an increase in the powers vested in the office of governor, and has tended to some extent to increase not only the power but also the importance of this office. However, although there has been this tendency to increase the importance of the office of governor, this has not always added materially to the powers of any one person holding that office.

As needs for new state activities have presented themselves, state legislatures have usually created a new and independent office for the purpose of meeting each new need. The experience of Illinois in the creation of offices for the handling of labor problems will illustrate this more clearly. The first specific need which presented itself was that for a body

*The author was closely associated with the state administrative reorganizations in Illinois and Ohio.

to collect information about labor matters, and such a body was established in 1879. With the increased development of large-scale production in factories, there came a need for legislation protecting those who work in such factories, and with the enactment of such legislation a factory inspector's office was created in 1893. The great Pullman strike of 1894 led to the creation of a state board of arbitration in 1895. With the development of the need for regulation of private employment agencies, and of regulations for the inspection of mines, powers in these respects were for a while vested in the same body which was established in 1879 for the collection of information regarding labor matters; but this was not in line with the general tendency, and soon independent bodies were created for the inspection of private employment agencies and for the administration of state mining legislation. For a while, when workmen's compensation legislation was first enacted, the administration of this legislation was vested in an existing body, but at the next session of the General Assembly a new body, the industrial board, was created for the administration of workmen's compensation legislation. Free employment offices began to be established in 1899. The offices established in each separate city were made substantially independent, and several offices established in Chicago were left substantially independent of each other, although all of these offices reported to a common central board.

These several bodies for the administration of labor laws in Illinois were created at different times, and naturally had conflicting and overlapping powers. Accident reports were required to at least five separate organizations within the state government, and no employer was sure whether he must report to one, two, three or more bodies; and as to when he had complied with the law with respect to accident reporting. Each type of accident report was definitely specified by statute, and when one employer had to report to two or more bodies, he was required to make a different type of report to each. The natural result was that the employer in most cases disregarded all of the laws with respect to accident reporting, and the confused relationships among the several state authorities prevented any one of them from detecting his violation of the law.

In each field of state activity in Illinois and in other states a similar development took place; until a state was poor indeed which did not have 50 or more independent boards, offices, and commissions with conflicting powers and jurisdictions. Illinois before 1917 had more than 100 such bodies, Michigan in 1920 had 116, Delaware over 100, New York 187, Massachusetts over 200, Maryland 85, Utah 48. In Michigan in 1920 the Governor was ex-officio a member of 24 boards.

In this development of independent bodies the states ran to a large extent to boards whose members had overlapping terms, so that no one governor could ordinarily appoint a majority of any one board during his term of office. In a large number of cases the statutes creating such boards also definitely specified that not more than a certain number of the members of such boards should belong to one political party.

In more than half the states the governors have two-year terms, and statutes providing either for boards or for offices with individual heads tended to provide for appointments running for a longer time than the governor's term. In Michigan during one term of two years the governor had a certainty before 1921 of appointing only five of the numerous state officers who were presumably subordinate to him. In Ohio before 1921 the Governor in one term of two years often had substantially little appointing power, although his predecessor may have had the power to appoint almost all of the officers and boards serving during his term. The Governor in a two-year term necessarily spends the first year learning something of his task; and in his second year he is facing a new election and a possible successor. His predecessor may under the arrangement of terms in Ohio before 1921, and in other states have chosen almost all of the important officers to carry on the work of the state government during his term; although if he were lucky, he might be the governor to choose the officers to carry on the work of state government not only during a part of his own term but also during the term of his successor.

The American state governor is the most conspicuous state officer. The candidate for the governorship probably makes his campaign honestly and sincerely upon a platform of doing things, and as the state officer most conspicuous in the eyes of the people, he is expected to keep his pledges. By the terms of the state constitution he is probably said to possess "supreme executive power" and the constitution probably also makes it his duty "to see that the laws are faithfully executed."

What situation does the new governor face when he comes into office? He finds that the constitution has given him a fairly large share in the work of legislation. He has probably been elected upon a platform of proposed executive and administrative adjustment; and facing the executive side of his task, he finds about the following situation:

(1) There is a group of constitutional executive state officers chosen ordinarily by popular vote, just as the governor has been, with some constitutional recognition of the governor's superiority over these other state officers, but with the political relationships between him and the other elective state officers such that the governor can actually exercise little supervision over them.

(2) He turns to the statutory organization of the state government and finds a large number of boards, offices, and commissions usually appointive by the governor (with the advice and consent of the Senate), but in many cases with terms so adjusted that he does not control the appointment of individual officers or of a majority of the members of boards. Even if he does control the appointment to the statutory boards, offices, and commissions, the governor finds so many of these bodies, and such conflicting authorities that the possibility of controlling them is slight because of their very multiplicity.

(3) The Governor has probably made the enforcement of certain state laws a part of his platform, but when he comes to examine his powers with respect to this matter he finds the enforcement of law throughout the state chiefly in the hands of locally elected officials over whom he has little control.

In his discouragement over any attempt to control the state administrative organization, the Governor is likely to give up the administrative task

as a hopeless one, and to turn to the field in which he has greatest power, that of legislation. That is, what we have done is to set up a so-called chief state executive with more power over legislation than over executive matters. We have made his task from the administrative standpoint largely a hopeless one. Governors have more often established reputations through legislative programs than through effective administration.

The difficulties outlined above are partly constitutional and partly statutory. Efforts were made by the New York constitutional convention of 1915 to deal through the constitutional text with the problem of consolidation of state administrative agencies, but the constitution proposed by this convention was rejected by the people. Massachusetts, by constitutional amendment of 1918, provided for an administrative consolidation, which was carried into effect by legislative act in 1919. Substantially nothing has been accomplished by means of constitutional change, unless the budget amendments of Maryland, Massachusetts, and West Virginia be so regarded. However, better results have been obtained with respect to the much larger part of the state administration which has been organized by statute and which can be altered without constitutional change.

The states began quite early to realize that a number of state charitable and penal institutions could not be efficiently managed through providing a separate board for each institution, without anything of coordination of the activities of the several institutions. The first development was toward setting up a single state board for the purpose of exercising some degree of supervision over the separately managed state institutions. Massachusetts created such a board in 1863 and was closely followed by other states. In more recent years the tendency with respect to charitable and penal institutions has been toward a single administrative management and control by one board, or by a single officer rather than a board. In the field of charities and corrections most of the states of the country now have their institutions managed by a single authority, and an increasing number have this central authority vested in a single department or individual rather than in a board. Steps toward consolidation and reorganization of state activities have also been taken in a number of other fields, particularly labor and agriculture.

Piecemeal consolidations of previously independent bodies acting in the same field have, however, accomplished little to reduce the multiplicity of state administrative bodies, for each new session of a state legislature has usually created as many offices as were abolished through consolidation. In more recent years the important development has been that toward some method of coordinating more closely all of the administrative functions of the state government carried on under statutory authority.

Attempts to Reorganize State Administration Without Increasing Power of Governor

In a number of states this effort to coordinate state administrative activities has taken place in such a manner as to weaken rather than to improve the position of the governor. Wisconsin a number of years ago began the plan of setting up a series of important commissions, with the members of each commission appointed with over-lapping terms, and with the establishment of continuing appropriations for such commissions. In this manner the commissions once created were made to a large extent independent of the biennial sessions of the legislature, and also through overlapping terms largely independent of the governor. In addition to this organization Wisconsin established in 1911 a board of public affairs which is composed of the governor, secretary of state, president pro tem of the senate, speaker of the assembly, chairman of the senate finance committee, and three other persons appointed by the Governor and approved by the senate for two year terms. The board has accounting and efficiency control over the state government, collects estimates from the different offices of the state government, and recommends a budget to the state legislature. In the preparation of the estimates the governor-elect has the right to be present.

Michigan in 1921 passed several laws, creating departments of labor and industry, agriculture, state welfare, conservation, and public safety. The directors of the departments of agriculture, state welfare, and conservation and the commissioner of public safety are appointed by the governor. However, the state welfare department is provided with a series of commissions which will actually manage the institutions, each commission handling a group of institutions and replacing separate boards for each institution. The commissions have jurisdiction over the institutions, though the heads are appointed by the governor on the recommendation of the proper commissions. The director of the department does not appear to have been given a great deal of power. Although the governor appoints the director of conservation, power are directly vested in a commission of conservation, of seven members. The department of labor and industry has at its head a commission of three members appointed by the governor with the advice and consent of the Senate, with a chairman appointed by the governor to have general supervision over the administrative affairs of the department. The departments established in 1921 constitute steps toward a more consolidated administration under the authority of the governor, but another law passed at the same session provides for a state administrative board composed of the governor, secretary of state, state treasurer, auditor general, attorney general, state highway commissioner, and superintendent of public instruction. This board is given general supervisory control over all offices and institutions of the state, and may issue orders with respect to the conduct of business, but no order may be issued without the written approval of the Governor. Powers with respect to the state budget and state purchasing are transferred to this board, and the board is given supervision over state accounting, and over the planning of state construction work. The Michigan plan may, in view of the creation of this board, be classed as one which to a large extent seeks to place the executive powers of the state in the hands of a commission or board composed of all of the elective state officers. The superior power of the governor is recognized, but not in a manner such as to give the governor anything in the nature of complete administrative command.

Indiana created in 1919 a state highway commission, and at the same time established a depart-

ment of conservation into which it consolidated a number of previously separate state activities. Both the state highway commission and the department of conservation are placed under commissions of four members each, not more than two of whom may be from the same party and one of whom is appointed each year. These commissions choose the directors for the administrative work of these portions of the state's service, and this type of organization does not, of course, in any way aid in the establishment of a really coordinated administration under a single authority.

New York in 1921 abolished the offices of military training commission, state superintendent of elections, department of narcotic drug control, and state printing board; but at the same session created a motion picture commission, and a water power commission. At the same time New York reorganized its public service commissions, its department of labor, and its tax commission, and provided a new organization for budgetary and contract work. The New York department of labor as established by legislation of 1921 has at its head an industrial commissioner appointed by the governor with the advice and consent of the Senate for a four year term. The Governor serves for a two year term. An industrial board of three members is created in the Department of Labor with rule-making and quasi-judicial powers, each member of the industral commission being appointed for a six year term, one being appointed each two years. The commissioner, however, is given full administrative control, and may sit with the industrial board in consideration of any matter except reviews under the provisions of the workmen's compensation Act. The relationship between the industrial commissioner as the head of the department and the industrial board for the exercise of rule-making and quasi-judicial powers is substantially the same as that recommended by the Reorganization Commission in New York. At the same session the New York legislature reorganized the tax commission and consolidated the tax work of the state more effectively. The legislation for this purpose provides for three commissioners appointed by the Governor with the advice and consent of the Senate for six year terms, one each two years. The president of the commission is made its executive head and is given sole charge of the administration of the department. The other two members exercise only certain powers which are vested specifically in the commission, but otherwise are under the direction of the president. At the same session the state organization for controlling public service corporations was reconstituted. A public service commission of five members was established with the members serving for ten year terms, and a transit commission of three members was provided for the City of New York. In the provision for these commissions there is no recognition of the need for an administrative head, and in this respect the New York legislature disregarded the recommendations of the Reconstruction Commission. At the same session, in creating a motion picture commission the legislature provided for three members with overlapping terms and with no administrative head of the work of the commission. That is, the legislature of New York in the two cases of taxation and labor reorganized services in such a way as to establish an administrative head of a department even though a commission was continued for quasi-judicial and rule-making power, and in two other cases entirely disregarded this more satisfactory plan.

At its 1921 session the legislature of New York also passed a so-called state finance law providing for a board of estimate and control composed of the governor, the chairman of the finance committee of the senate, the chairman of the ways and means committee of the assembly, and the state comptroller. This board has power to investigate and to make recommendations to heads of departments, and to see that such recommendations are carried out. The board also receives and revises estimates of appropriations and presents recommendations to the two houses of the legislature; and makes rules as to contracts and purchases of articles to be used by more than one department. New York through its board of estimate and control, very much as Wisconsin through its board of public affairs and Michigan through its state administrative board, seeks to put a large portion of the executive authority of the state in commission.

New Jersey has perhaps gone farther than any other state in the direction of creating a series of commissions substantially independent of any one governor, for the conduct of the administrative affairs of the state. By legislation which began in 1915 and which has continued in succeeding sessions the state of New Jersey has established consolidated departments of shell fisheries, commerce and navigation, conservation and development, taxes and assessments, agriculture, labor, charities and corrections, fish and game. The department of labor has at its head a commissioner of labor appointed by the governor with the advice and consent of the senate for a four year term. The governor of New Jersey serves for a three year term, so this does not give him complete control over this office. However, the departments of agriculture, shell fisheries, commerce and navigation, conservation and development, and charities and corrections, are substantially removed from the control of the governor. Each of these departments is under the control of a board of eight members, and in three of them not more than four of these members may belong to the same political party. The members of these boards are appointed by the governor with the advice and consent of the Senate, for overlapping terms longer than that of the governor. In the case of the department of agriculture the governor's power of appointment is limited to those chosen by delegates of certain organizations, and in the case of the department of charities and corrections the governor makes his appointments to the board without regard to political considerations. All of these boards, however, choose and control the heads of their respective departments, and the heads of the departments of shell fisheries, commerce and navigation, agriculture, conservation and development, and charities and corrections, are in no real way under the supervision of the governor at all, although the governor is ex officio member of the board of charities and corrections. The secretary of agriculture is appointed within the classified civil service, and the commissioner of charities and corrections is in the unclassified civil service, and is to hold his office at the will of the board which appoints him. The board of fish and game commissioners and the state board of taxes

and assessments are composed of members with overlapping terms serving for five years.

From this brief outline of organization it will appear quite clearly that the administrative work of the state of New Jersey has been placed in a group of commissions, apparently with the notion of protecting it from the governor. Not only this, but by statute a state house commission has been created composed of the governor, state treasurer, and state comptroller. However, the state purchasing agent acting under this commission is appointed by the governor with the advice and consent of the senate for a five year term, removable by the governor for cause.

In 1915, at the same time when the legislature of New Jersey consolidated a number of previously separate activities under departments controlled by boards independently of the governor, a law was also passed requiring that certain of the more important bodies be represented at a meeting once each month. The first meeting was to be called by the governor who was made ex-officio member and chairman, and the group of six department heads so required to meet once each month were authorized to submit recommendations annually to the legislature to promote efficiency and to prevent duplication in engineering work.

In New Jersey estimates for appropriations are prepared for the governor on blanks furnished by the comptroller, and the governor transmits requests to the legislature with his recommendations. With respect to appropriations, however, the state house commission is authorized to permit transfers of items within appropriations granted to any department and emergency funds when appropriated have been placed under the authority of the state house commission rather than under the authority of the governor.

The states just discussed proceed largely upon the assumption that the governor is a person to be distrusted, and that a large amount of administrative authority in the state should be vested in a board of which the governor is but one member. New Jersey has perhaps gone farthest not only in this respect, but also in the establishment of consolidated departments which should be made substantially independent of any central executive control.

Attempts to Better Conditions Through Power of Governor

Another group of states has sought to reach the problem of a better administrative organization by means of a coordinating board rather completely under the control of the governor. California in 1911 created a state board of control of three members to hold office at the pleasure of the governor. Duties were imposed upon this board to examine the books of all institutions, to visit institutions, to pass on claims against the state, to approve all warrants drawn on the state treasury, to set up an accounting system for the state, and to approve contracts for the purchase of supplies and materials. The department of public accounting created under the board was authorized with the approval of the board to require reports from all offices and institutions. The board was also authorized with the approval of the governor to authorize the creation of deficiencies. Here we have a substantial recognition of the fact that with the multiplicity of administrative bodies within the state the governor cannot exercise an effective personal supervision over them; and California in 1911 therefore created a board of three members subject to the control of the governor who should substantially act as his agency for the purpose of exercising such a supervision.

Alabama in 1919 did much the same thing by providing for a state board of control and economy of three members appointed by the governor, and to hold at his will, removable at his discretion. This board, however, was not given quite so wide an authority as the somewhat similar board in California, but was authorized to expend all moneys appropriated by the state for eleemosynary and charitable institutions, and to make purchases for all departments and activities of the state government. The separate boards were left in Alabama for each institution, but the state board is given charge of the business affairs of the institutions as well as supervision over all state purchases.

Similar to the Alabama organization is the board of administration created in Kansas in 1917. This board is composed of four members of whom the governor is one member and chairman. The other three members are appointed by the governor by and with the advice and consent of the Senate, with overlapping terms. The governor may remove members of this board. The members are required to give all of their time to their offices, and supersede boards for the benevolent, educational and penal institutions of the state. This board is required to employ a business manager for the institutions under its control and may discharge him. It is contemplated that the business manager shall be really the administrative head of all of the work under the board of administration. The term "business manager" has caused the Kansas organization to be rather widely discussed, although it does not go so far as those of California and Alabama.

The state board of control of West Virginia is in a way the parent of boards of control such as those established in California, Alabama, and Kansas. The state board of control of West Virginia is composed of three members appointed for six years with overlapping terms, whose function it is to manage the charitable institutions of the state and to have charge of the financial and business affairs of the educational institutions. This board makes plans for all new buildings to be constructed by the state, and purchases supplies for both charitable and educational institutions. The state board of education, composed of a larger number of members but appointed in the same manner, has charge of educational institutions. The board in West Virginia is not so completely under the control of the governor as are the boards in California, Alabama, and Kansas.

The board for the administration of state institutions in Tennessee, and the board of control in Texas, are somewhat comparable with the boards just referred to. The board of administration of state institutions in Tennessee is made up of the governor, treasurer, and general manager of state institutions, but the governor's control of the board is made effective through the fact that the general manager of state institutions is appointed by the governor and is removable by the governor for cause. The general manager is, however, appointed

for a four year term whereas the governor is elected only for a two year term, and in this respect the Tennessee organization is somewhat comparable with that of states in the group first discussed above. The board for the administration of state institutions in Tennessee manages the institutions and purchases supplies for them. In Tennessee a state budget commission was created by legislation of 1917 composed of the governor, comptroller, treasurer, secretary of state, and auditor. This plan of placing budget control in the hands of the elective state officers makes the Tennessee situation much more comparable with that of the group of states first discussed than with those such as California and Alabama. The budget organization in Tennessee is similar to that provided for the state of West Virginia by constitutional amendment, and both West Virginia and Tennessee thus place the executive control to a large extent in the hands of boards of which the governor is but one member.

Texas is comparable with Tennessee in its state board of control, which is composed of three members appointed for terms of six years, one each two years. The Texas state board of control, however, has a wider jurisdiction in some ways, and is organized into divisions of public printing; purchasing; auditing; design, construction and maintenance; estimates and appropriations; and eleemosynary institutions. This board has control of the purchasing of supplies for all departments of state government, and supervision over the erection of all state buildings. It also has the duty of obtaining estimates and preparing a biennial budget as well as that of exercising the powers previously vested in the board of managers of charitable institutions.

Complete Administrative Reorganization

A number of states have realized that the way to reorganize state administration, so far as this can be done by statute, is not to proceed by piecemeal reorganization of specific departments while continuing to create new and additional offices, nor to set up a board under the governor through which the governor may exercise some greater degree of supervision over numerous offices. These states have proceeded upon an assumption precisely contrary to that of the group of states of which New Jersey is the most conspicuous example, and have thought that the best administrative organization for the state is that of creating a small series of departments each having within it a group of related functions, and each under a director or head directly responsible to the governor. New York sought in an ineffective and unsatisfactory way to become the leader of this group of states in 1915, but constitutional provisions for this purpose were rejected by popular vote. Illinois in 1917 under the guidance of Governor Frank O. Lowden, through its civil administrative code led the way in the direction of an effective administrative reorganization under the governor into a group of small departments. Nebraska and Idaho followed in 1919; Washington and Ohio in 1921. Massachusetts in 1919, in compliance with the provisions of a constitutional amendment adopted in 1918, reorganized the services of that state and is sometimes classified in this group. However, Massachusetts organized its services into sixteen departments in addition to its elective offices, and preserved the substantial independence of at least nine other statutory offices. In view of this fact Massachusetts cannot be classed with the states which have taken a long forward step toward administrative reorganization; and this seems to be recognized by a resolve adopted by the Massachusetts general court in 1921 establishing a special commission to investigate problems of administrative organization.

Pennsylvania in recent years has done a great deal by separate acts of the legislature in the way of reorganizing effectively its administrative system; and the state of Missouri has taken a long step in advance by a series of laws enacted in 1921. The Missouri legislation is not altogether satisfactory, and the more essential elements which go to make up the Missouri organization are now in suspense because of referendum petitions. By legislation of 1921 California has taken a hesitating step toward complete administrative reorganization.

None of the states in the group just enumerated, which have done the most in the way of reorganizing their administrations, have hit upon an ideal scheme. The reorganization acts in Illinois, Nebraska, Idaho, Washington, and Ohio, are all a result of compromise with various political, official, and institutional interests, and there would be no great difficulty in improving them; but they do constitute the most effective examples of state administrative organization yet provided for in this country. The number of departments and the types of departments created in these several states vary a good deal. Illinois established nine departments. The Nebraska legislation of 1919 established six departments; but Nebraska has a number of constitutional bodies such as its board of commissioners of state institutions, board of regents, and state railroad commission, whose activities could not be brought within the scope of a statutory reorganization. Idaho by legislation of 1919 reorganized its state administrative services into nine departments, but in 1921 consolidated the work of its department of commerce and industry with that of its department of finance. Ohio has provided eight departments, and Washington ten. Differences in local needs have caused departments to be established in one state for activities which constitute merely divisions of departments in another state. For example, the state of Washington has departments of conservation and fish and game, and Idaho has a department of reclamation. Problems regarding fish and game are clearly more important in a state like Washington than in either Ohio or Illinois. Problems of conservation and reclamation play a larger part in Idaho and Washington than they do in more distinctly industrial states such as Ohio and Illinois, although there may not be so much reason in fact for this difference. The proposed reorganization in Arizona in 1921 which failed of enactment provided for a consolidated department of labor and industry, uniting the activities which in Illinois and Ohio are properly organized into two departments.

Although states must vary in the departments which they will need and in the organization which they may adopt, it is yet desirable that there should be for the states adopting a complete administrative reorganization a similarity of departmental names, so that the activities found in one state under a title may be found in other states under much the same title. Upon the basis of the outline presented above of legislation in the several

states it may be well to analyze briefly the chief problems of state administrative reorganization.

Chief Problems of State Administrative Reorganization

In more than half of the states of this country the governor serves for a two year term. There is no possibility of organizing an effective state administration so long as the head of that administration changes so frequently.

The governor as the chief executive officer of the state acts and must for a long time act in co-operation with a group of other elective state officers. It is desirable that this group of elective state officers be reduced and that the states approach the federal plan of organization, and have an administrative organization completely under the control of a popularly elected and responsible state executive officer.

Changes in the term of the governor and in the number of other elective state officers require constitutional alterations and must come slowly. However, it is desirable that the governor should be recognized as the chief executive officer of the state, so far as this result can be accomplished by statute. A number of states which are referred to above have tended to place the state administrative power in commission, and under such a plan it is out of the question to organize the work of the state effectively or to hold any one person responsible for the proper conduct of that work.

The organization of the state administration into a small group of departments with each department itself made responsible to the governor, arouses some fear that such a plan sets up a despotism in the state. Such a plan is in theory that of the national government, and there is nothing to be feared from organizing a responsible state administration under the control of a popularly elected governor chosen at the most for a period of four years. It would be wise, however, to have the governor of the state chosen for a period even longer than four years and not subject to re-election. The two year period makes it impossible to organize a state administration effectively, and a four year period, with the possibility of re-election, ties the hands of an ambitious governor. The governor is the most conspicuous officer of the state, and in practically all of our states he now appoints some officers who are more important than some of those who are elective by the people of the state at large.

A good deal of progress has been made toward the simplification of our state administrative organization, but in the main the state plan is still that of hiding responsibility in hundreds of separate little compartments. Improvement may be expected from the concentration of power in the governor, and from knowledge on the part of the people as to whom they may hold responsible for the proper conduct of state affairs. The possibility of abuse and of greater political power goes with the opportunity for improving state administration. Shall we assume that our state governments are bad and seek to prevent their doing anything effectively, while at the same time imposing upon them constantly greater and more important tasks; or shall we unloosen the hands of state government and give it a chance to do its work effectively, assuming at the same time that increased power to work effectively means an increased possibility of danger as well? But the increased possibility of danger carries with it an effective means of discovering the danger, because the executive organization and the governor as its responsible head will under such a plan be so conspicuous that inefficiency or corruption cannot hide itself.

In order to accomplish this purpose it would be wise wherever possible to vest complete appointing power as to the heads of departments in the governor without the advice and consent of the senate. The responsibility for administration is thus more definitely vested in the governor; and should an occasion present itself when the state senate is out of political harmony with the governor, no confusion results from an impossibility of making the appointments which the governor thinks should be made, for the conduct of the work of the government for which he, the governor, is responsible.

The departments into which the state administrative work is organized should be few enough for the governor to control, and each should have related work. It is possible that more harm than good will come from an effort to unite control over educational and penal institutions as has been done in West Virginia, Kansas, and some other states, and it is also questionable whether the departments of business control and efficiency organized in Washington may not because of overlapping jurisdictions among themselves and with the superintendents of institutions come into serious conflict with each other to the detriment of the service of the state. Ordinarily, placing upon two or three officers or bodies a responsibility for different parts of the same task will result unsatisfactorily.

Once the organization into departments has been agreed upon, the head of each department should be given complete responsibility under the governor for the work of that department. Great credit is due to Governor Harry L. Davis of Ohio for insisting that the directors of departments have authority to appoint the heads of the divisions in their departments. No governor can properly hold the head of a department responsible for the work of the department, and at the same time dictate to him the details as to who shall be employed within the department or as to the methods of its administration. This does not mean that there should be an absence of co-operation among all of the departments, for the heads of the small group of administrative departments should meet at certain regular intervals with the governor for a discussion of common problems.

One of the most serious problems in connection with state administrative organization is that as to the quasi-judicial and discretionary functions to be performed by the state. Tax commissions, public utility commissions, and industrial commissions for the administration of workmen's compensation laws, must pass upon matters of a quasi-judicial character, such as the valuation of property, the reasonableness of rates, and the question as to whether an injured workman is entitled to compensation. Not only this, but there has been a tendency in recent years to vest a greater and greater degree of rule making power in administrative bodies, so that in Ohio, New York, and a number of other states some provision must be made for the adoption by administrative authority of a body of subordinate legislation, power to enact which has been delegated by the legislature. This

is true not only of the department of labor but also in many cases of departments of health, agriculture, and of other bodies within the state government. These quasi-judicial and quasi-legislative functions are of necessity closely related to large administrative fnctions.

How should these functions be performed? It has not been uncommon even in the states which have gone farthest in the way of an administrative reorganization to leave commissions with overlapping terms for the performance of functions with respect to civil service, public utilities, labor, and taxation. These functions must be performed, and to some extent it is desirable to have a group perform certain parts of them, rather than an individual. In the Illinois reorganization, the public utilities commission, tax commission, and industrial commission are substantially independent, and are merely placed within the departments of trade and commerce, finance, and labor for administrative purposes. The Ohio reorganization of 1921 seek definitely to vest in the heads of departments the administrative work for the commissions, and makes the heads of the departments of commerce, finance, and industrial relations, ex-officio secretaries of the public utilities commission, tax commission, and industrial commission, respectively.

The state of Massachusetts by its reorganization of 1919 places its civil service administration under a single commissioner, but provides two associate commissioners who are to act with the commissioner in connection with the making of rules and the hearing of appeals. Massachusetts also provides a somewhat similar organization with respect to its department of labor and industries. The New York legislation, reorganizing the tax commission and the department of labor in 1921, gets much the same result by providing for three tax commissioners, but with the president having complete administrative control; and for a department of labor with an industrial commissioner at its head, but with an industrial board of three members for rule-making and quasi-judicial powers, the industrial commissioner being authorized to sit with the industrial commission in most matters. The department of labor and industry, organized in Michigan in 1921, uses a somewhat similar plan, providing for a commission of three members with the chairman appointed by the governor and having general supervision over the administrative affairs of the department.

It is, of course, possible to adopt a plan somewhat similar to that employed before 1921 in connection with the department of health of the state of Ohio. Under this plan a board chose the head of the department, but after choosing him remained merely as a body for rule making and certain other powers, acting in these respects upon matters submitted by the head of the department, who became upon his appointment a member of the board. This plan, however, largely destroys the power of the governor over the head of such a department and is unwise for this reason.

For a short time the Public Service Commission for the first district in New York (that is, for the City of New York) was composed of but one commissioner, and this plan did not seem to work unsatisfactorily. The Reconstruction Commission of the state of New York recommended that the public service commissions both for the first and second departments should each be composed of a single commissioner appointed by the governor with the consent of the senate, and that each commissioner should have two deputies to act with him in the hearing of quasi-judicial and quasi-legislative questions, but with the commissioner responsible for the final decision. This plan was not adopted in New York and the new public service commissions created in 1921 have no single heads for the work or regulating public utilities in either of the districts. This continues what in most of our states has been one of the chief defects of public utility regulation.

There is a definite tendency at the present time toward the use of single individuals for this quasi-judicial or quasi-legislative work, upon the assumption that in almost all of the quasi-judicial work of administrative bodies there is a definite judicial review and that decision by one individual will not result in abuse. Maryland has adopted the plan of a single state employment commissioner instead of a civil service commission. In Wisconsin in 1921 a legislative committee recommended the replacing of the tax, conservation, and civil service commissions by single officers; and in some states single tax commissioners have been provided with satisfactory results. The problem of adjusting properly the relationship between commissions and administrative responsibility has not been fully worked out. The plans employed in Ohio, Massachusetts, New York, Michigan and other states must be observed and more experience gained upon this point, before we can have any judgment as to what plan will be best, if commissions for certain purposes cannot be replaced by single officers.

From the standpoint of mass of legislation the two subjects upon which state administrative reorganization has gone farthest are those of state purchasing and state budgets. Some states have done nothing more toward co-ordinating their administrative organization than to set up central machinery for purchasing or for budget estimates, or for both.

The determination as to what estimates should be presented by administrative departments for proposed future expenditures, and the control of expenditures after appropriations are made, are primarily executive functions; for the executive department normally spends much the greater amount of money appropriated for state governmental purposes. Three states (Maryland, West Virginia, and Massachusetts) have adopted constitutional amendments with respect to the budget. Budgetary legislation has been enacted in nearly all of the states of this country, but little result has been obtained in many of these states from so-called budgetary legislation. Most of this legislation has proceeded without an administrative reorganization, and some states (West Virginia by constitutional amendment) place the preparation of estimates for budgetary purposes in the hands of a commission of officers of whom the governor is but one. Without a consolidated administration, budget estimates are apt to constitute merely a set of compiled figures. The governor cannot control what will be asked or obtained by those not responsible to him, and a single executive budget policy can come only from a consolidated executive under a single command. The term "budget" when applied merely to a consolidated statement of esti-

mates means nothing, but this is the general use of the term in many of the states which have adopted a so-called budget plan. The compilation of estimates into a single document with some revision before they go to the legislative body is of some assistance, but unless there is a single command to make sure that the budget as proposed is adhered to by those within the executive department, the estimates amount to little. Not only this, but after a budget is adopted, it means not a great deal unless there is permanent machinery within the state government for the centralized administration of the budget so as to make sure that deficits are not incurred and that economy is practiced. These functions are executive functions, although the function of determining whether an appropriation shall be made, and if so how much, is a legislative function through which the legislative department ought to control the policy of the state administration. In most of our states the legislative department is unable to obtain information upon the basis of which to exercise an adequate supervision over appropriations, and this basis for such a supervision can be obtained only through a consolidated executive administration.

In this country we have neither in the nation nor in the state developed much of continuity of administrative policy from one administration to another. A new president comes into office with new policies and with little of detailed knowledge of the administrative work of the national government or of the reasons why certain policies were adopted by his predecessor. A state governor comes into office under the same conditions.

The main argument for overlapping boards such as have been set up in New Jersey is that of continuity of policy, and of a more permanent tenure for technical experts in governmental service. The New Jersey plan, however, does not necessarily obtain continuity of policy and permanent service for technical experts, though it does destroy the possibility of handling state business as a single enterprise. Some means must be developed however both in the national and in the state service, for a continuity of expert tenure, and for a continuity of governmental policy in matters not political in character.

This constitutes one of the serious problems in connection both with state and with national administrative reorganization. By civil service laws we have sought to take some steps toward continuity of service for government experts, but in the main we have limited the effective application of civil service to the less important and more subordinate employments. It is entirely proper that the heads of administrative departments should change both in state and in nation for they are the policy advisors of the president or of the governor and should represent from a political standpoint the same interests as their chief. The more important task of government is that of carrying out effectively day by day the actual work of administration, and this does not involve matters of politics or of policy. We must develop in this country, both in nation and in state, standards of public service which will keep in office under the heads of departments important technical subordinates and experts who may aid in carrying on the detailed work of government effectively, and who in their positions must be fully loyal to the policies outlined by their administrative heads when those heads change from one administration to another. Both in the national and in the state service we have to some extent come in individual cases to recognize the indispensable character of continuous service for certain officers who are not subordinates, but we must so far as possible build up under the heads of departments a complete and permanent administrative organization which can efficiently carry out governmental policy and which can do this in loyalty to department chiefs of whatever party.

In governmental matters we have no standards for the measurement of success or failure. Private business fails when it is unsuccessful. A public administration when it is unsuccessful increases taxes or issues bonds. We must obtain in our public service, through the comparison of state with state and of municipality with municipality something of standards to be applied in the measurement of success or failure in the work of government. Government is not business and cannot become so, but the administrative side of government presents much the same problems as do those of private business, and we must develop something of definite responsibility for governmental tasks and of definite standards by which to measure the success with which those tasks are performed.

Responsible leadership in our states is most likely to come from the governor. The executive organization is the one permanent organization around which an administrative responsibility and a real leadership can be developed. This leadership cannot be developed by scattering authority. We cannot at the present time hold our state governors responsible for the effectiveness with which governmental work is done because they have no authority to see that this work is done effectively. With the governor actually in authority over the state executive organization, and with such a simplification of that organization that all of its problems can be presented clearly to the state legislative bodies, legislation will be more effective and our government will be better conducted. It must be borne in mind that nine-tenths of the task of legislation has to do with state and local administrative problems, and that with state and local administrative organizations as complex and as disorganized as they now are, state legislative bodies must necessarily in their work reflect to a great extent this chaotic situation.

Much has been done in the field of state government during the past ten years, and much remains to be done. It is fortunate that we have awaked to the importance of the problem. Bryce was right when in the first edition of his "American Commonwealth" he spoke of our city governments as the greatest failure in American political life. The statement does not hold today because we have given attention to city affairs, and while improvement can still be made, cities are not now the reproach which they were thirty years ago. Our state governments have begun the same type of forward development. The problem of bettering state government is to a large extent tied up with that of a better organization of local government within the states and to this problem a great deal of attention has not yet been given.

POLICE POWER AND THE KANSAS INDUSTRIAL COURT

Protection of Public Health and Public Peace the Foundations on Which Mainly Rests the Authority of this Administrative Tribunal

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THE history of civilized man is a record of the continuous yielding of private right to public right, of individual freedom to the general welfare. From the day the first savage became a member of a family on through the growth of the clan, the tribe and the race, the individual has dwindled and society has expanded. This growth of public right, more and more limiting and restricting private right, is the most striking fact of the last fifty years. The increasing complexity of civilization, the growth of population and the constantly accelerating urbanization of this country have gone hand in hand with the development of the police power; not in the invention of new principles of police power, but in the application to more and more subjects as such application becomes necessary to the general welfare. When the periphery of my private right impinges upon the periphery of your private right, each ceases to expand; they become stationary

Under the law these rights, the one private right as against another, have been stationary for generations. The law of private rights has been crystallized for hundreds of years, but when the periphery of my private right or your private right impinges upon the periphery of the public right, my private right not only ceases to expand and becomes stationary, but dwindles. The public right more and more grows and encroaches upon my private right.

Before entering upon a discussion of the Kansas Industrial Court Law and the legal principles and decisions upon which it is based, it may be well to define this police power about which so much is said and apparently so little is known.

Edmund Burke, in one of his sublime orations, said that the whole State and Power of England, its King, its Lords and Commons, its Army and its Navy were constituted, ordained and maintained for the sole purpose of getting twelve honest men into the jury box; that is, the protection of the citizen's life, liberty and property by forms of law instead of by arbitrary power. But the institution and the processes of the courts exhaust but a portion of the police power of the State. A vast reservoir of the police power remains to be administered by the executive arm, what is commonly known as the administrative branch of the Government. And let me say here that a dictum of an early English Court, attempting to distinguish between the administration of justice as an independent attribute of the English Constitution and the Police Power, which was the King's prerogative, has misled many law writers into separating the administration of justice from the general police power.

Courts administer police power by certain long recognized formulae, but it is, nevertheless, the police power of the state that is thus exercised. But after the courts have functioned, there remains a vast domain of police power, exercised by the administrative arm, which deals with the general welfare of the people, education, public health, the maintenance of public peace, public morals and even the comfort and convenience of the citizen. All of these are under the watchful exercise of the police power. There is this clear distinction between the exercise of the police power by a court, and by the administrative arm. The court is inert until its jurisdiction is sought and invoked by appropriate formulae. A court cannot go out and seize a criminal and try him until a complaint has been presented and a warrant issued. The court cannot collect your debt until a complaint has been filed against the debtor. A court cannot do equity until the equitable jurisdiction has been set in motion by an appropriate bill. But the administrative arm acts ex proprio vigore. It acts without complaint, without warning and even without investigation. It may act upon suspicion or surmise. It has inquisitorial power, power to subpœna witnesses and compel the production of books and papers without any complaint being filed, wherein it differs from a court. You can not swear a witness in court until there is a legal controversy before the court. The exercise of the police power by the administrative arm is swifter of execution, speedier in action and presents many advantages over the rule-hampered action of the court. That is the reason why it was decided to make the Industrial Court an administrative body rather than a judicial body. As a court it would have had advantages. It could punish for contempt; it could execute its own orders. You cannot confer administrative functions upon a court, but you can confer quasi judicial powers upon an administrative body, the power to investigate, to take evidence, to deliberate, to weigh and to find the facts. These powers can be conferred upon a Legislative Tribunal, or upon its arm, a committee sitting for the purpose of investigation.

The administrative arm can anticipate labor troubles and strikes by investigating the conditions surrounding the mine or factory where disputes and industrial troubles are reaching an acute stage. Before a strike has been called, before there is an overt act of industrial warfare, it can publish its findings so that the public will know whether the worker is getting a fair wage, working reasonable hours, giving an honest day's work for his wage, and so that the public can know whether the business of the employer

*The author was for eight years state senator, and during all of the time chairman of the Judiciary Committee of the senate. At the present time he is a member of the Commission to codify the General Statutes of the State of Kansas, Commissioner from Kansas to the National Conference of Commissioners on Uniform State Laws, and president of the State Historical Society. He is also counsel for the State in the cases against Howat in the supreme court, and in all other litigation connected with the Industrial Court when it reaches the supreme court of the state.

can reasonably stand shorter hours or an advance in wages without increasing the price that he charges the consumer. In fact, if these inquisitorial powers of the court were all its powers, these things were all that it could do, it would be worth the cost. Publicity, like the sunlight, is a great germicide. No sociological wrong can stand the light of day. The truth will kill it. If everyone knew the wholesale and the retail cost of the articles which they buy, there would be no profiteering.

Whatever doubts there may be as to the constitutionality of some parts of the Industrial Court law, no one has ever questioned the right of the State, under its police power, to establish this administrative body and give it these inquisitorial powers.

It is true, Mr. Howatt, who is now in contempt for refusing to obey the process of the court and testify, has appealed to the Supreme Court of the United States, but that court, in the Interstate Commerce Case (154 U. S.) has decided every question raised by Mr. Howatt's appeal, against him.

Coming now to the question of police power, it is the broadest, the most unlimited, the most illimitable of all the powers of Government. Outside of a limited number of cases, where the police power affects the rights of property, the right to bear arms, public assembly and the freedom of religion, where the police powers are limited by certain amendments, the only boundaries, the only circumscriptions of that police power are that the exercise of it must be reasonable, and that it must tend to the public welfare. No respectable court and no text-writer has ever attempted to go further than this in setting boundaries to the power and each case is decided upon the particular and instant question of fact.

It may be said that the police power is the end and aim and final object of all civil government, because the end and object of all civil government is to promote the general welfare and happiness of the citizen, and it is with that that the police power more closely deals.

The police power greets you at the threshold of life, where it prescribes the qualifications of the doctor and the nurse who bring you into the world. It follows you to the tomb, where it regulates the cemetery where your ashes are finally interred. And during all the interval from the first puny wail of the new-born child, to the death rattle of the dying, it surrounds you every moment with its invisible, ever present protection. Waking or sleeping, alone or in company, in the crowded street or on the lonely prairie, the police power is there, not merely protecting your life, your liberty and your property, but protecting your health, the morals of your community and safeguarding the comfort and convenience of your daily life.

The police power is the only power that can take and destroy private property for public benefit, without compensation to the owner, as where it destroys an unsafe or unsanitary building. It is the only power that can destroy the sanctity of a contract, which the Constitution says shall be held sacred. It is the only power that can over-ride a treaty, which the Constitution says shall be the supreme law of the land, as was held in the New Orleans quarantine cases, where a health regulation of the city of New Orleans set aside a treaty stipulation between America and France. It is the most comprehensive and most minute of all the powers of government. It protects the cattle of the Kansas farmer against Texas fever, and it protects the migratory birds against undue and continuous slaughter in their seasonal flights. It regulates the length of time that the mill whistle may blow, without undue disturbance to the peace and quiet of the neighborhood, and it stops the great liner with its thousands of passengers, at the threshold of the country, until every individual has proven his right to be admitted upon the ground of his physical and moral healthfulness.

It is the most flexible of the governmental powers, adjusting itself almost instantly to every change of conditions. The police power which adequately regulated the movements of the stage coach, was found sufficient, without any extension of power, by merely adapting established principles to new conditions, to regulate the railroads, the steamboats and the automobile, and shortly it will reach its long arm into the sky and regulate the air lanes and the aviator. Every time a new and dangerous mechanism is invented, whether for labor or pleasure, the police power seizes its control and regulates it for the safety of the public.

Its two greatest functions are the protection of the public health and the public peace, and these are the foundations upon which, mainly, the power of the Industrial Court rests. In the first place, the Legislature defines the necessaries of life as food, fuel and clothing. This is not a legislative fiat; it simply recognizes the primal necessities of life in the temperate zone. A man may live, love and be happy in a tent, a cave, or a dug-out; but to be well, to be healthy, he must have food, fuel and clothes. The State is not concerned with whether a man has one suit of clothes, or a dozen; one meal a day, or five. It is not concerned with whether he has fuel enough to warm a ten-room house, or one room. But it is concerned, and the public health demands, that every family shall have so much food, so much fuel and so much clothing as shall maintain their health, keep them in decent comfort and provide for the sturdy upbringing of the future of the race.

Whenever a strike, a shut-down, or a lock-out threatens such a shortage in these necessities as endangers the public health, then the State has the same interest in the strike or the lock-out that it has in an approaching epidemic of contagious disease. The State need not wait until the smallpox or yellow fever has invaded a community. It may quarantine against these evils far in advance, prohibit persons coming from an infected community, from entering the district where the public are yet whole. It may shut up an infected family within its dwelling, indefinitely, to protect the whole from the infection. This prohibition against any interference with the continued adequate production and distribution of the necessaries of life applies equally to the employer as well as the employee.

The power thus asserted in the law is seriously questioned. It may be unconstitutional. But you will find, in examining the law, that every power of doubtful constitutionality is segregated, placed in a section by itself, so that, if any power asserted by the court is denied by the Supreme Court of the United States, the other powers remain. The constitutionality of the court and its inquisitorial power are unassailable. Of course, under this branch of the court's power, only such industries are affected as produce and distribute these necessaries of life. A strike in a match factory,

or a chewing gum factory, would not come within the purview of the court under this head.

But there is another police power equally as important, and that is the protection of the public peace. If a strike of any considerable size endangers the public peace, the police reserves are put on duty; the sheriff swears in a swarm of deputies; frequently the militia is called out—nearly always there is bloodshed, loss of life, destruction of property; in fact, these things are almost inevitable. They have come to be regarded as an integral part of the strike, inevitable factors of this private warfare, just as the killing and maiming of man is inevitable in public warfare. The State has a right to anticipate violence and prevent it, as well as punish it after the act. If I threaten you with violence, you can have me bound over to keep the peace. So the law says that whenever there is a strike, or the danger of a strike, that threatens the public peace of a community, this court shall at once begin to function, it shall examine the merits of the controversy, it shall find, determine and publish who is right and who is wrong; it will ascertain and announce whether the workmen's hours shall be shorter, whether his wage shall be higher, whether the employer of the working man is entitled to a higher price for his product in order to pay such high wage.

That the classification or limitation of the industries that come under the purview of the Kansas Act is not arbitrary was fairly decided in Jones v. City of Portland, 245 U. S. 217. In that case the court took judicial notice that fuel was a necessity of life in the Temperate Zone; that the provision of a sufficient quantity of it was necessary to the public health, and to that end the city might engage in the coal business.

What avail would be a well heated house to the individual citizen if he had no food for his family? Or given a well heated house and a sufficient larder, what would these avail him if neither he nor his family had sufficient clothing so that he might carry on his business and his children attend school? One is as necessary as the other. The moment that the supreme court took judicial notice of the fact that fuel is necessary to public health so that the state itself might engage in the fuel business, the basis was laid for the Kansas Act.

In the very recent case of Coal Company v. Fuel Commission, 268 Federal 563, there is a striking discussion of the growth of the police power and the court there upheld the fixing of coal prices by the Indiana Coal Commission. The Court said:

> The state, under its police power, *can lay its hand upon the coal-mining industry.* There may be, today, wholly private businesses that we would have no hesitancy, today, in saying were beyond the reach of the legislature; but our sons or our grandsons may find a very urgent necessity for including that class of businesses, or enterprises, within the regulation of the state, under its police power.

This from a federal court, the stronghold of conservatism, two judges sitting and concurring.

In Wilson v. New, upholding the Adamson Act, the Supreme Court took judicial notice of the fact that there was a strike impending, had already been called to become effectual on a certain date; that this strike would tie up all the railroads of the country; that as a result of the absolute tie-up of distribution of the necessaries of life, public health would inevitably be impaired and public peace probably disturbed. It placed its approval of the Act upon these grounds. While per se the federal government has no police power, that being all reserved to the state, it has such incidental police power, such implied police power as is necessary to carry out powers directly granted. This police power was exercised in the Debs case as incidental to the control of interstate commerce.

Wilson v. New marked at that time the farthest advance of the police power in federal decisions. It was an outpost case. Lawyers looked to see it withdrawn under the attack of the enemies of social regulation. So far from being withdrawn, it has been very far extended in Block v. Hirsh. In fact, considering the latter case, Wilson v. New is conservative.

In his dissenting opinion in Wilson v. New, Justice McReynolds called attention to the fact that if the government could say to the railroad employer that when the employee had worked eight hours he had earned a day's pay, it could with equal propriety say to the employee that he could not collect a day's pay until he had worked eight hours; that such power of regulation must work both ways. In other words, the power to prescribe an eight-hour day as against the employer includes the power to regulate against the employee. This again paves the way for the Kansas Industrial Court Law.

The extension of public right as against the private right, of which I have spoken at the outset, is clearly marked in the changing views of the United States supreme court. Munn v. Illinois (94 U. S. 113) was another outpost case. Up to that time it had been generally thought by the lawyers and generally held by the courts of this country that the right to regulation depended upon the right of the public to demand service; that wherever there was freedom of contract in a certain industry, wherever the corporation could grant or refuse its service, there was no right of regulation. In Munn v. Illinois, for the first time this distinction was impliedly denied, although not in expressed terms; the act which made the elevators sought to be regulated by the acts in question, public elevators, provided that they must receive wheat by whomever tendered, so that the distinction was not made clear. It was then believed by lawyers that this outpost would be withdrawn. This decision was in 1887.

In Budd v. State of New York (143 U. S. 517), decided in 1892, this right of regulation of elevators in the state of New York was again upheld and it was made to apply not only to elevators built on privately owned ground, but to floating elevators in the waters of the New York harbor. In this case Judge Brewer filed a dissent, one of the strongest of his great opinions. He attempted to distinguish between "public use" and "public interest in a use." His opinion is a striking one. It deplores this modern tendency of the police law. He predicted in the gloomiest terms the destruction of our system of government, the downfall of society, if these two decisions of Munn v. Illinois and Budd v. New York were permitted to stand and become the law of the land. For a long time thereafter many courts followed the dissenting opinion of Judge Brewer and held with him that only where a corporation was performing a public service, such as the railroad, or where it had the public grant of a franchise which amounted to a monopoly, could this power of regulation be exercised. I think it fair to say that the general thought of the lawyers of the country was along this line; that regulation was cor-

relative to and dependent upon the public right to demand service regardless of persons.

Finally in 1914, in the case of The German Alliance Insurance Company v. Kansas (233 U. S. 389) the court definitely considered and rejected this proposition. It was urged with great force and clarity by that distinguished lawyer, Mr. John Johnson of Philadelphia. The court there held that the test of whether an industry was impressed with the public interest was not that it had a franchise granting a monopoly or that it performed a governmental function, such as interstate commerce, but that the people were so largely interested in it, that the nature of the business was such that a court could say definitely that it was so impressed with the public interest as that the state might regulate it; this with reference to the business of writing fire insurance, purely a personal contract, the service that the insurance company might give or withhold. Surely if the business of writing fire insurance is impressed with the public interest, how much more so the production and distribution of food, fuel and clothing.

This leads me back to the case of Wilson v. New (243 U. S. 332). That decision was based upon the fact that the distribution of the necessaries of life was essential to the public health; but distribution is secondary. Production is the primary essential. Until there has been production there can be no distribution. All the railroads in the United States cannot furnish one bottle of milk for a starving child until the cow has functioned. All the railroads in the United States cannot furnish one loaf of bread until the farmer, miller and baker have coordinated in their work of production. How absurd then, how utterly futile to say that there is a public interest in distribution, that distribution is so impressed with public necessity as that the state may control and regulate, and to deny that the production of these necessities of life, these essentials to public health, are not within the purview of the police power. In most communities distribution could be fairly well carried on if the railroads stopped by auto trucks and horse-drawn vehicles, but without production there could be no distribution whatever.

So far back as 1820 Congress, which exercises full police power over the District of Columbia, regulated the size and quality of a loaf of bread, the rates of hackney coaches and the prices for sweeping chimneys. In 1841 the city of Mobile regulated the size, quality and price of a loaf of bread, and this ordinance was upheld by the Alabama supreme court (3 Ala. 140).

When the Revolution was accomplished each separate state of the American union succeeded to the legislative power of the British Parliament; that is to say, it was unlimited, unless and until the people of the several states by their constitutions limited the powers. It is, of course, elementary that the federal constitution is a grant, the state constitution a restriction. We look to the federal constitution to see what powers are granted and to the state constitution to see what powers are denied. We shall look in vain in any state constitution for a denial of the right of the legislature to limit "the God-given right" to strike. The right to strike has grown up under the common law. It has received tacit recognition by the courts. But common law rights, rights which find and base their recognition solely in the decisions of the courts are always subject to statutory limitation. Since there can be found no limitation in any state constitution forbidding the regulation of the conduct of labor unions where such conduct, as in the case of strikes, is a menace to public health or dangerous to the public peace, we must go to the federal constitution for any limitation of that right, and we shall find it there only in the war amendments, if at all.

Counsel for union labor denounce the Kansas Industrial Court law because it institutes "involuntary servitude." Just here let me say that there is not a line or syllable in the Court law which requires any man to work an hour unwillingly at a given occupation. He may quit any time he pleases and go to some other occupation. We have in Kansas, and I presume the same law is established in many other states, a statute which forbids a locomotive engineer to abandon his engine between the division points. "Involuntary servitude" surely. The engineer is chained to his locomotive as the galley slave to his oar; true only a limited period, but the "involuntary servitude" is there. But these critics ignore the fact that no one compelled Casey Jones to be first a wiper, then a fireman and finally an engineer. The state did not conscript him and compel him to become an engineer. The state does not require him to continue to be an engineer. He may quit at the division point at the end of his run at any time, but the public interest requires him, having taken the locomotive at the division point, to go on to the end of his run until another engineer can take his place, and thus insure the continuity of traffic. The engineer who enters railroad employment in a sense enlists in a public service. He takes its subject to this particular requirement. No one compels him to take it. No one compels him to continue it. All that our law says is that while he may quit as an individual at any time he desires, he may not conspire and combine with his fellow workers to use the strike as a club to cripple the industry, to impair the public health and endanger the public peace in order to enforce demands which he may litigate before this court.

This distinction once grasped settles the whole controversy. The state having recognized the fact that these three essential industries are impressed with the same public interest as the railroad, that production of the essentials of life is primary to distribution and more necessary, every man who engages in these industries accepts the conditions of his employment exactly as the engineer accepts his. If this restriction of the right to strike, if this compulsion to submit his controversy to an impartial court is distasteful to him, he may refrain from that occupation or he may leave it.

Counsel for the "Employers' Association" (euphemism for trust) join with the labor union bosses in denouncing the law. We who are ground between these upper and nether mill stones might fairly conclude that if the law is so obnoxious to these two trusts, the employers and employees, it must be a good thing for the plain, common citizen. Unintelligent critics say that the law will be a failure because all compulsory arbitration has been a failure, but this law is not a compulsory arbitration law. The vice with all arbitrations is that both parties are represented on the arbitral body with one or more neutrals, who are supposed to represent the general public, and who mostly know nothing about the controversy. Generally after a period of warfare exhaustion comes and one side or the other yields. The result is diplomatic;

the stronger party wins and the weaker party loses. If the employer is strong, unembarrassed by outstanding contracts, while the union is weak, the union loses while the employer wins. If the union has a strong war chest and the employer is weak, the union wins. No attempt is made to arrive at the truth of the controversy. It is a negotiated peace, the stronger party winning.

Under the Kansas Law neither side is represented any more than the litigant in a law suit. The court takes evidence, weighs it, finds the right of the controversy and so establishes it. It is juridical and not diplomatic. For that reason alone it should appeal to the bar of the country. It attempts to settle these controversies by the same rules of right and justice that have distinguished Anglo-Saxon law for generations. We in Kansas see nothing sacrosanct in these labor controversies. We say they are to be judged and determined the same as other controversies between man and man. We have abolished the ordeal by battle and the duello, and we intend to abolish this private warfare between labor and capital with all its loss and destruction. But we did not prohibit the strike until we had given labor a forum where its grievances could be heard and its rights established.

The Industrial Court Law has been before the Supreme Court of the State of Kansas twice. The contempt proceeding against Howat previously alluded to, and the last case of The State, ex rel. v. Howat, decided June 11, 1921. Howat and his associates on the district board were enjoined by the District Court of Crawford County from calling a strike in the coal mines of Kansas. The board deliberately violated the injunction by calling a strike in one mine. They were cited for contempt, found guilty by the lower court and each sentenced to one year in jail. They appealed the case. The opinion of Justice Burch in this case is worthy of the study of every lawyer in the United States. It is too lengthy to even quote from here. It is lengthy because the court met openly and fairly every one of the numerous contentions of the counsel for defendants and answered them. The court explicitly upholds the validity of the Act, both as to its form, the manner of its enactment and its constitutional sanction. The court further holds that the business of producing coal in the state "bears an intimate relation to the public peace, health and welfare, is affected with a public interest, and may be regulated to the end that reasonable continuity and efficiency of production may be maintained." It is one of the ablest opinions ever written by Justice Burch, who is noted for his clarity of thought and felicity of expression. Of course, the law has yet to run the gauntlet of the Supreme Court of the United States, but in considering the cases to which I have briefly alluded, I have personally not the slightest doubt that it will be upheld in its major provisions.

The question of the right of the court to declare what is a reasonable wage will be decided in the Wolff Packing Company case before this article goes to print. The law then so far as our supreme court is concerned will be defined in every particular, and will be the law of the state, unless that august tribunal in Washington shall say otherwise.

WORK OF SECTIONS AND COMMITTEES

Commerce, Trade and Commercial Law

THE report of the committee on Commerce, Trade and Commercial Law, to be submitted to the Association at Cincinnati, is an unusually complete document, making many important recommendations. It emphasizes the desirability of making the meetings of committees of the Association which are concerned with formulating laws affecting social and economic conditions and the administration thereof more public in their character. In line with the same idea of more light and more public participation in such matters, it recommends that the Association adopt resolutions requesting public administrative bodies to give each member of the public the right to file a brief as amicus, to proceed only on notice and full hearing, and to adopt certain other procedure with the same end in view.

The committee further recommends that the Association adopt a resolution "as a fundamental proposition" that the law merchant should be brought into harmony with the actual usages, customs and practices of business, provided the same are ethical and desirable in the public interest; that acts of Congress which do not expressly so provide be amended so as to give the public a right to intervene in proceedings before administrative bodies; that the bill submitted by the committee as to a Uniform State Arbitration Act and that amending the National Bankruptcy Act be approved; that the bill to amend the Pomerene Bills of Lading in Interstate and Foreign Commerce Act be received and approved, except as to section 20a and 21 referring to "shippers weight, load and count," as to which there is still a sharp conflict of opinion among railroads and shippers.

The committee further recommends that it be instructed to give further consideration to the subject of a system of Federal Commercial Courts; that it be instructed to prepare and submit a "Merchandise Marks Act" as to interstate and foreign commerce; that a resolution be adopted reiterating the endorsement of bills affecting commercial bribery in interstate and foreign commerce; that the bill submitted as to negotiability of documents of title under the Uniform State Sales Act and of warehouse receipts under the Uniform State Warehouse Receipts Act, and the bill to amend Section 20 of the Uniform Warehouse Receipt Act be approved.

The committee also recommends that it be given further time to submit a draft of an act to codify the Law of Common Carriers in Interstate and Foreign Commerce; that it be instructed to give further consideration to the tentative draft of a bill relating to Sales and Contracts to Sell in Interstate and Foreign Commerce, and of a bill relating to Arbitration of Disputes in the same fields in the light of criticisms and suggestions; that it be given further time to consider the committee's bill as to a Uniform State Declaratory Judgment Act; that the committee be instructed to give further consideration to the question of legal ethics involved where counsel act on behalf of trade associations and members thereof and persons not members of trade

associations, and to report at the next meeting; that the Association do not endorse Senate Bill No. 1012 pertaining to Declaratory Judgments in the Federal Courts, but that action be postponed until further light can be had.

The committee also recommends that the law should be amended so as to provide a permanent chairman for each federal administrative body; that adequate payment should be provided to members and examiners of such bodies for traveling expenses when on official duties, and that a resolution should be adopted calling for a federal statute making all records and documents on file with administrative bodies open to the public, with the right to make copies when compatible with the public interest, under regulations to be adopted by such bodies; that the matters of the administration of the anti-trust laws and the Federal Trade Commission, as set forth in its report of 1920, and the matter of declaratory orders and advisory opinions of administrative bodies be resubmitted to it; and that a resolution instruct the committee to give further consideration to the subject of uniformity of the law merchant in North and South America.

Committee on Law of Aviation

The report of the special committee on the Law of Aviation, to be presented to the executive committee at Cincinnati, recommends, if the executive committee approves, that the members of the American Bar Association be requested to give their attention to the fundamental problems of jurisprudence, and especially of constitutional law, involved in the proper solution of the demands of aeronautics.

It further recommends that the Association at the annual meeting express its hope that, in the enactment of any legislation by Congress, the most careful consideration will be given to the constitutional features of all the proposed plans, to the end that it may be determined whether the proper development and regulation of aeronautics does not require a constitutional amendment conferring complete jurisdiction over aeronautics upon United States, instead of attempting to adopt devices of questionable constitutionality to make existing national powers apply to this new branch of human activity; and that meanwhile all national legislation studiedly observe existing constitutional limitations and preserve without assault the existing division of powers between the United States and the States.

Space is lacking to quote extensively from the report, but the opinion of the committee as to a constitutional amendment is here reproduced:

> The members of this committee having been severally sworn as a condition to admission to the practice of law, to support the Constitution of the United States, and having an affectionate regard for that instrument with its bill of rights, are unanimously of the opinion that if complete control over aeronautics is to be lodged in the national government for exercise to the extent which may from time to time be deemed expedient, the power should be conferred by *constitutional amendment* and should not be seized in the guise of the exercise of existing powers. Every exercise of existing powers which goes beyond the obvious or necessarily implicit extent of these powers is fraught not only with the visible danger of attack on the ground of unconstitutionality and of invasion of the essential or reserved powers of the states, but with the more insidious danger of a further weakening of constitutional limitations deliberately incorporated in the bill of rights which is the very groundwork of the Constitution and its earlier amendments.
>
> Since, so far as we are advised, it appears to be the unanimous judgment of those practically interested in the development of the art of flying, that the demands of progress require a uniform law operative throughout the country, and emanating from a single source of power; and that the national government is obviously this single source; and that no uniform law, uniformly interpreted and uniformly administered, can be expected from the joint or similar action of one national legislature and the federal courts and of 48 state legislatures and the state courts; it necessarily follows that if this judgment is to be followed the national government should be vested with the power, to be exercised, as we have already said, from time to time as may be deemed expedient. It may appear expedient in the early stages of the art, and until otherwise demonstrated by experience, that many features of regulation of peculiarly local interest shall be suffered to be locally regulated; a method which finds analogy and illustration in the early history of the cautious exercise of the Congressional power to regulate interstate commerce.

The committee recommends that it be continued as a special committee of the Association.

Draft of Trade-Mark Act

A committee of the section of Patent Trade-mark and Copyright Law has prepared a preliminary draft of a Trade-mark Act, with certain revisions. This tentative draft was received too late for insertion in the August Journal. The committee is very much interested in securing suggestions as to this proposed legislation, and those who are disposed to aid it in this respect can doubtless secure a copy of the Act, which has been printed for the committee, by applying to Chairman Edward S. Rogers, 841, 122 South Michigan Boulevard, Chicago, Illinois.

Statement from Mr. Brock

To the members of the American Bar Association:

In the printed report of the committee on Commerce, Trade and Commercial Law, I am registered as not approving sections 14, 20 (meaning 20-a), 21 and 22 of the Bill to amend the Pomerene Bills of Lading Act.

It was not possible for me to attend any meetings of the committee, and my disapproval expressed to the Chairman was based upon the most hurried and cursory examination of the proof of the bill.

No action by the Association is recommended as to sections 20-a and 21, and so that may be eliminated. A more careful analysis of section 14 has cleared away the basis of my disapproval of that section.

My reason for dissenting from section 22 was a doubt in my own mind as to whether the clause "who has given value in good faith . . ." limits and qualifies as well the consignee named in a straight bill as the holder of an order bill. Language wholly unambiguous, unequivocally rendering the qualifying phrase applicable to both, could readily have been employed. However, Mr. James, the chairman of our committee, writes me:

> There is absolutely no doubt that this clause applies to both (a) a consignee named in a straight bill and (b) the holder of an order bill.

If it is certain that the clause does apply to the consignee named in a straight bill as it is certain that it applies to the holder of an order bill, there would be no basis for disapproval of the section so far as I am concerned.

CHARLES R. BROCK.

Denver, Col.

CURRENT LEGAL LITERATURE

GEORGE H. GOBLE in the May issue of the Kentucky Law Journal traces the growth of regulation of the use of property from the Munn Case to the recent Rent Cases and adds:

> And since according to Justice Holmes in the rent cases, "a legislative declaration concerning public conditions is entitled to great respect," the present state of the law will allow a state legislature, by a mere declaration, to place almost any business in *the class of businesses subject to regulation*. This means private rights in property are insecure to that extent, and this is so because the common good demands that they be insecure.
>
> But if the interests of property have been rendered insecure from the interference indicated above, they have at the same time obtained security from the much graver peril of socialism. It is believed the development of this doctrine of the law will effectually check the advances of socialism, because the doctrine recognizes that under our present political system, the legislature can assume as full and complete control over private property and private business as the welfare of the public requires. Socialism will have no purpose, if what socialism wants can be obtained without socialism. In 1876 (the date of the Munn decision) the public welfare required that the legislature control the business of storing grain, which theretofore had been strictly private, and immune from governmental interference. It was granted. In 1921 the public welfare demanded legislative control of rents and tenant property in New York, Washington and other places. It was granted. In the future, the public welfare may require the legislative control of the food staples, our natural resources or we know not what. If so, it will be granted. Whatever the public good requires, the police power will give. No constitutional limitations can prevent it.
>
> In his dissenting opinion in the rent cases, Justice McKenna said, "This decision smacks of socialism." But doesn't it smack of socialism only to the extent of taking the wind out of the sails of socialism. Isn't it better for the interests of all that the decision should *smack* of socialism, than that it *be* socialism, which ultimately might have been the only alternative? If the Supreme Court, so quietly and peaceably, has accomplished this result, well might property interests be grateful for the stand taken,

Of ranking importance is the address by United States Senator Atlee Pomerene before the Virginia Bar Association in which is discussed *the Transportation Act of 1920*. This address is printed in the May-June issue of the American Law Review.

There is printed in the July number of the American Journal of International Law *the Treaty of Peace between the Allied Powers and Turkey*.

A careful collection and discussion of the authorities on *inheritance by and through adopted children* are found in the leading article in the Central Law Journal of July. The author is W. W. Herron, of Jefferson City, Mo.

When destinguished practitioners leave posts of political preferment and attempt to re-enter active practice, is their success problematical? *"Is there a Resurrection at the Bar?"* Is the title of an article by Fred H. Peterson, of Seattle, Wash., in the Central Law Journal, of June 24.

Mr. Justice Grace, of the *Supreme Court of North Dakota*, describes the *new rules* under which that court has been able to clear its calendar of all accumulated cases. Central Law Journal, July 22.

Law Notes (July) says:

> "It is to-day a commonplace to lawyers that in the last few years judicial construction has given to the police power a scope never before dreamed of; has recognized as open to police regulation a multitude of matters which have heretofore been deemed of private concern. While graphic in its formulation, there is little if any exaggeration in the statement of the United States Circuit Court of Appeal (*American Coal Min. Co.* v. *Special Fuel and Food Com.*, 268 Fed. 563) that the police power of the states "is absolutely as wide—laying aside for the moment the part of the absolute sovereignty that has been made over to the federal government—as that of the Arab sheik, sitting out in front of his tent, controlling the actions of his tribal members." The manner in which that power grows with the growing complexity of national life was well indicated in the same case by Judge Baker who said in concluding the opinion of the court: "There may be, to-day, wholly private businesses that we would have no hesitancy, to-day, in saying were beyond the reach of the Legislature—saying so, just as we would say in case of a verdict of a jury, because there is no basis of fact upon which to predicate such a finding; but our sons, or our grandsons, may find a very urgent necessity for including that class of business, or enterprises, within the regulation of the state, under its police power." The salient feature in this situation is that in passing on the propriety of a particular exercise of the police power a court is not deciding a question of law but one of fact, and is deciding it not from evidence but from the personal opinions of the judges. The judges of the United States Supreme Court have no peculiar fitness to pass on the question whether public health demanded the New York rent laws, any more than they had a few years ago to pass on whether public health demanded the New York bakery law. The modern concept of the police power completely answers so far as the exercise of that power is concerned, the sticklers for the sanctity of judicial functions, since the determination of the question whether a particular exercise of the police power is justified by an existing exigency is not in its nature a judicial function. Whether, as a matter of expediency, it is a function which can be best performed by the judiciary is another question. But the "constitutional lawyers" of the United States should awaken to the fact that the old order has passed and will not return howsoever its passing is bewailed. It is the condition and the ideals of the present, not those of the past which must be reckoned with. Quoting again from the American Coal Mining Co. case: "Now, did the adoption of the Fourteenth Amendment mean that civilization was arrested at that date? Did it mean that the historian of the year 3000 would look back to the year 1868 as the time of the formation of a crystallized stratum of civilization in which, as in the geological stratum, he might find the footprints of the megatherium and the fossils of the dinosaurus?"

The May issue of the Iowa Law Bulletin contains a valuable account of the history of the doctrine as to *freeholds in futuro* in both England and American law. The author is Percy Bordwell.

In the February number of the South African Law Journal, G. H. Malan considers the question as to the nature of criminal intent looked at from the juristic point of view. The author had previously set for himself to determine whether the method employed by practical jurisprudence on questions of intention had anything in common with the methods adopted by Ethical and Psychological treatments of the subject and had taken the position that the juristic method was different from that of Intuitional Ethics and Introspective Psychology, but was identical with that of the new Behavioristic Psychology and, on the whole, of the new Pragmatic Ethics. If it be a fact that legal science is in this respect unsuspectedly modern, having anticipated the finding of this new and important school of Psychology, it is a most interesting fact and supplies a reason for looking into the author's further defense of his position which the article under review contains. As a philosopher, the author identifies himself with the new schools of Ethics and Psychology. A par-

donable professional pride may, therefore, be taken in the following quotation.

> He (the author) should like to say, in passing, that methodologically the juristic treatment of the question (of will) contrasts very favorably with the anarchic superiority to co-ordinated effort characterizing the treatment of the problem by Ethical writers and, until quite recently, by Psychologists. And he may add that it is to a jurist that he is principally indebted for showing him the way to an exact analytic study of the will—none other than the great analyst Bentham in his Principles of Morals and Legislation.

Returning to the author's theory as to the criminal *mens rea*, he summarizes it in two steps as follows:

1. His theory starts with the cardinal fact that neither judge nor juryman can ever have direct intuitive insight into the mind of the accused person. This introspective awareness is a source of information as to the accused's intention accessible to him alone. Others must be content with the external observation of the man's bodily acts or movements. The accused's admissions are no exception to this proposition nor is the testimony of experts.

2. From this it follows that the logical character of the procedure actually followed by the judge or juryman in deciding whether the accused is guilty of committing an act whose effects were intentionally willed is to determine whether the man's *whole* behavior has that relation to the effects which marks the behavior of an ordinary man who, under such circumstances, intends those effects. The knowledge of the accused's behavior does or does not coincide with what the judge or juryman otherwise knows of intentional human behavior. If it does, the reason for passing sentence is already established. If the judge or juryman goes further and makes the inference that the actual intention is present in the mind of the accused, he has taken a distinct and additional logical step which from the standpoint of strict logical proof is superfluous. It cannot be a further additional and independent ground for asserting the existence of the intention. It is therefore useless to adduce the existence of the intention as an additional logical reason for passing sentence.

The author then goes on to meet two attacks upon his first proposition. It is asserted that the accused's confession affords a direct means of knowing his actual intention. This cannot be an intuitive source of evidence for no one but the accused can "intuit" his mind. Whether the confession is truthful can be inferred only from conduct, including in that term consistency. Though honest, nothing more can be directly inferred than the existence of the present memory idea of the intention in question, certainly not the existence of the past intention. The testimony of experts, if such there be, is no exception. Ability to compare the accused's behavior with behavior which is the sign of intention in ordinary men under the circumstances presupposes a reflective familiarity with one's own intentional consciousness. This may be acquired opportunistically in the course of ordinary life or in a systematic way. The latter is the way of the experts. In this and in the fact that their familiarity with their own intentional consciousness is greater added to greater skill in observing and comparing the accused's behavior lies all that distinguishes them from non-expert witnesses.

The author does not deny that the final inference as to actual existence of the intent may be made, and made, too, as legitimately as many of the inferences which are constantly made. His point is that such inference is redundant.

He further discusses the nature of intent, including so-called indirect intent, in a thought provoking fashion.

CURRENT POLITICAL AND ECONOMIC REVIEW

THE Treaty of Versailles is still a matter of dispute, but while the dispute is going on, evidence is accumulating as to the possibility of certain ideas which have been suggested, looking toward international control. In the Saar Basin an international commission has been officially functioning since February 21, 1920, and it is giving an account of its stewardship in frequent detailed reports. *The Political Science Quarterly* (June 1921) contains an article by F. M. Russell entitled "The Saar Basin Governing Commission." This Commission is composed of five members which sit in the territory and act as a representative of the League of Nations. One of the members must be a citizen of France, one a native inhabitant of the Saar, and the three other members must belong to three countries other than France and Germany. The Commission was given "all the powers of government hitherto belonging to the German Empire, Prussia or Bavaria . . ."

Mr. Russell points out the difficulties under which the Commission is operating and comments in a discriminating manner upon the experiences to date. If such a Commission's régime should prove conducive to material welfare and civil liberty, some opinions may be changed as to the possibility of international control.

Prof. Seligman's Tax Suggestions

While the public is insisting upon tax revision before tariff legislation is taken up, Professor Edwin R. A. Seligman has brought forth a succinct statement of taxation principles together with a suggestion as to the course of action to be followed at this time. See the current (August) edition of the *North American Review*. Aside from the canons of elasticity and adequacy of return Mr. Seligman points out the necessity of considering the possibilities of successful administration.

> First, we need certainty of taxation; if the law be uncertain, it will necessarily be inefficient in operation. Second, we need economy of taxation, that is, an economical adjustment of yield to efforts: if the tax costs an inordinate amount to collect, it represents administrative inefficiency the very opposite of economy. Third, the tax should be so administered as to involve the least possible inconvenience to the tax payer.

Also, he cautions:

> A more significant problem, however, is that the immediate or ultimate effects of taxation on the economic situation as a whole. It is the function of the wise legis-

lator to have taxation interfere as little as possible with the general prosperity of the community.

In application his principles condemn the excess-profits tax which he thinks in its harmful effects can be compared only to some of the mediaeval taxes on consumption, the so-called "nuisances taxes" which yield altogether too little to warrant their continuance; the higher brackets of surtax upon incomes because of the decreasing returns which come as the levy is raised; and also the proposed tax upon sales, for in "normal life the best way to secure the social surplus which forms the basis of civilization is to increase production, rather than limit consumption."

The article points out that the property tax is coming rapidly more and more into disrepute for it is more and more a tax upon savings and modern business methods with varying turnover impair the value of taking the value of property as the norm of taxation. As a constructive step, he suggests the elimination of the tax exemption features attached to the billions of state and local securities as the most crying demand of reform; also a recognition of the principle that income, private and corporate, is a more satisfactory norm than property, and a tax upon specific luxuries more desirable than a tax upon consumption in general.

Federal Reserve and the Interest Problem

The Federal Reserve Board has been under constant pressure of late to reduce its interest rates, and in many cases has responded, many people think, unwisely to the pressure of parties who think they will profit by lower interest rates. In the *Annalist* (July 25) is an article by A. W. Russell, Treasurer of the Russell Wheel and Foundry Company, entitled: "Interest Rate Manipulation to Stabilize Country." Mr. Russell says:

> The effect of lower commercial interest rates would be, first, that bonds and stocks would advance in market value; new issues of Government, railroad or corporation bonds would be encouraged. To some extent, at least, demands would be stimulated; liquidation and consequent distribution of purchasing power would result.

If interest rates should be lowered mechanically at this time, it is equally true that when the economic cycle is operating at high pressure, interest rates should be raised mechanically to prevent reaching the peak which invites the trough of the cycle. But parties adversely affected do not always submit gracefully.

At present there is some question whether lower interest rates in themselves are sufficient to produce a business recovery, for if people are not buying, if profits are not large, if stocks on hand are still not liquidated, the cheapness of money in itself is but one factor toward a business pick-up and in itself may not be sufficient. Beneath all the discussion, however, is the question whether or not the action of the government in creating a Federal Reserve system does not imply that the Board is to respond to public opinion as to what ought to be done, whether that public opinion is wise or not. Has the Federal Reserve system, by the very nature of its creation, become an instrument of the people's will? And is it not possible that this involves the possibility of a constant scramble for favorable treatment for cattle raisers, cotton growers, and who knows what not?

Mr. Wells on the "Purposes of History"

When Mr. H. G. Wells wrote his "Outline for History" he invited a host of criticism. One of these critics went so far as to suggest that in his Outlines Mr. Wells kicked from his feet this footstool earth and plunged out into the illimitable inane; but Mr. Wells has a comeback to the critics and in the *Yale Review* (July) he gives his comeback in an article entitled "History for Everybody; A Postscript to the 'Outlines of History.'" Here he comments upon the educational significance of the reception given his "Outlines" and also gives consideration to the mental attitudes and, as he calls it, the "moral and intellectual pose into which it has thrown certain of its critics."

To get Mr. Wells' viewpoint, it is well to read this article. He explains how he attempted to write an outline into which everyone might fit his own particular reading and historical interests; history that appeals to individual experience, that is, tied up to everyday and present day life. He calls attention to the lack of appreciation of the purposes of history in the popularly conceived educational system.

He asks:

> For why do we teach history to our children? To take them out of themselves, to place them in a conscious relationship to the whole community in which they live, to make them realize themselves as actors and authors in a great drama which began long before they were born and which opens out to issues far transcending any personal ends in their interest and importance. And it is a commonplace to say that in the last century or so the sphere of human interest has widened out with marvellous rapidity until it comprehends the whole world. Economically, intellectually, and in many other ways the world becomes one community. But, while there has been this enormous enlargement of human interests, there has been, if anything, a narrowing down of the scope of historical teaching. If the reader will look into the sort of history that is taught in schools today and compare it with the yellow old books of our great grandfathers, he will find rather a shrinkage towards the intensive study of particular periods and phases of history than an extension to meet the more extensive needs of a new age.

Mr. Wells writes with feeling. He has certain attitudes toward life that many think color unduly historical fact. But Mr. Wells possesses a keenness of vision, a poignancy of thrust, an ability to weigh conflicting evidence, and above all an awareness of the needs and limitations of his readers that makes it possible for him to contribute substantially to improvement in historical method.

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Brief Notes of Other Reviews

Prices rise and fall; uncertainty produces havoc. One method to stabilize prices is discussed by B. H. Hibbard, *American Economic Review* (June) in an article entitled "Stabilization of Prices." Pooling and its possibilities form the nub of the discussion.

The *Annals of the American Academy of Political and Social Science* (July) is devoted wholly to the subject: "The Place of the United States in a World Organization for the Maintenance of Peace."

The *Journal of Political Economy* (July) has "A Survey of Profit Sharing and Bonuses in Chicago Printing Plants." A study is detailed but not overly technical.

Divided China is the subject of two articles written by John Dewey for *The New Republic* (July 20 and July 27).

Should the Commissioner of Immigration be an anthropologist, exercising authority conferred upon him by a Congress of biologists? Vernon Kellogg writing on Race and Americanization for *The Yale Review* (July) stresses race as basic in human evolution.

WILLARD E. ATKINS.
University of Chicago.
August 8, 1921.

PROGRAM OF ANNUAL ASSOCIATION MEETING

Cincinnati, Ohio, August 31 and September 1 and 2

MEETINGS

All meetings of the Association will be held in the Ball Room at the Hotel Sinton.

The Executive Committee will meet on Tuesday, August 30, at 8:30 p. m., in Parlor F Mezzanine Floor), Hotel Sinton.

The General Council will meet in the Parlor F (Mezzanine Floor), Hotel Sinton. The first meeting of the General Council will be held on Wednesday, August 31, at 9:00 a. m.

The Ohio Bar Association is holding its meeting this year at the same time and place as the American Bar Association, and all members of the Ohio and Cincinnati Bar will be welcome at the meetings of the American Bar Association.

REGISTRATION

The Offices of the Secretary and Treasurer will be located in the Hotel Sinton, Tea Room, (Main Floor) and will open for registration of members and delegates and for the sale of dinner tickets, on Monday morning, August 29, at 10:00 o'clock.

BUSINESS PROGRAM OF THE ASSOCIATION

Wednesday Morning, August 31, at 10 O'clock

Acting President Hampton L. Carson, of Pennsylvania, will preside at this session.

Addresses of welcome, on behalf of Ohio State Bar Association, by Harry L. Davis, Governor of Ohio, and on behalf of the Cincinnati Bar Association, by John Galvin, Mayor of Cincinnati.

Announcements.

Report of the Secretary.
Report of the Treasurer.
Report of the Executive Committee.
Nomination and Election of Members.

In the place of the late President, James M. Beck, of New York, will deliver an address on "The Spirit of Lawlessness."

State delegations will meet in the Ball Room (Main Floor) Hotel Sinton at the CLOSE of this session to nominate members of the General Council, and to select nominees for Vice-President and Local Council for each State.

Wednesday Afternoon, August 31, 2:00 O'clock

Daniel W. Iddings, President of the Ohio State Bar Association, will preside at this session.

2:00 p. m. Annual Business Meeting of Ohio State Bar Association.

4:00 p. m. Joint Session of American Bar Association and Ohio State Bar Association.
Address by Harry M. Daugherty, Attorney-General of the United States.

Wednesday Evening, August 31, at 8:00 O'clock

Elihu Root, of New York, will preside at this session.

Address: "Our Brethren Overseas," by John W. Davis, of New York.

Address by Rt. Hon. Sir John A. Simon, K. C., of London, former Attorney-General of England.

Presentation of Memorial Tributes to Edward Douglass White, William A. Blount and Stephen S. Gregory.

Election of the General Council.

Thursday Morning, September 1, at 10:00 O'clock

Frederick W. Lehmann, of Missouri, will preside at this session.

Reports of Sections and Committees. The names of Chairmen are given below.

The consideration of the Reports will begin promptly at 10:00 o'clock.

SECTIONS

10:00 a. m. Criminal Law. Edwin M. Abbott.
10:05 a. m. Comparative Law. Robert P. Shick.
10:10 a. m. Judicial Section. Charles A. Woods.
10:20 a. m. Legal Education. Elihu Root.
10:30 a. m. Patent, Trade-Mark and Copyright Law. A. C. Paul.
10:40 a. m. Public Utility Law. Bentley W. Warren.
10:50 a. m. National Conference of Commissioners on Uniform State Laws. Henry Stockbridge.
11:00. a. m. Conference of Bar Association Delegates. Stiles W. Burr.

COMMITTEES

11:10 a. m. Professional Ethics and Grievances. Edward A. Harriman.
11:20 a. m. Commerce, Trade and Commercial Law. Francis B. James.
11:40 a. m. International Law. Charles Noble Gregory.
11:50 a. m. Insurance Law. Arthur I. Vorys.
12:00 m. Publicity. Martin Conboy.
12:10 p. m. Memorials. W. Thomas Kemp.
12:15 p. m. Jurisprudence and Law Reform. Everett P. Wheeler.
1:00 p. m. *Adjournment.*
2:30 p. m. Excursion (to be announced later).

Thursday Evening, September 1, at 8:00 O'clock

George Sutherland, of Utah, will preside at this session.

Address: "Without a Friend," by Charles S. Thomas of Colorado.

Reports of Committees. The names of Chairmen are given below.

9:15 p. m. Admiralty and Maritime Law. Robert M. Hughes.
9:25 a. m. Noteworthy Changes in Statute Law. Thomas I. Parkinson.
9:35 p. m. Drafting of Legislation. William Draper Lewis.
9:40 p. m. Uniform Judicial Procedure. Thomas Wall Shelton.
9:50 p. m. *Adjournment.*

Friday Morning, September 2, at 10:00 O'clock

Hampton L. Carson, of Pennsylvania, will preside at this session.

A Symposium on the general subject "The Administration of Criminal Justice," under three subtopics as follows:

10:05 a. m. "Unenforceable Law," by Charles S. Whitman, New York.
10:30 a. m. "The Illegal Enforcement of Criminal Law," by Luther Z. Rosser, of Georgia.
10:55 a. m. "The Adjustment of Penalties," by Marcus A. Kavanaugh, of Illinois.
11:20 a. m. General Discussion by Association.
12:45 p. m. Nomination and Election of Officers. Adjournment at 1:00 o'clock.

Friday Afternoon, September 2, at 2:30 O'clock

Geo. T. Page, of Illinois, will preside at this session.

Reports of Committees. The names of Chairmen are given below.

2:35 p m. Membership. Frederick E. Wadhams.
2:45 p. m. Change of Date of Presidential Inauguration. William L. Putnam.
3:00 p. m. Classification and Restatement of Law. James D. Andrews.
3:15 p. m. Legal Aid Work. Reginald Heber Smith.
3:30 p. m. Aviation. Charles A. Boston.
Miscellaneous Business.
Adjournment *sine die*.

Friday Evening, September 2

William H. Taft, of Connecticut, will preside at the Dinner.

Annual Dinner at 7:00 p. m.
nouncements.)

Dinner to Ladies at 7:00 p. m.

Saturday, September 3

All day *Excursion* to Dayton, Ohio, as guests of Montgomery County Bar Association.

Subsidiary and Allied Bodies

CONFERENCE OF BAR ASSOCIATION DELEGATES

The Conference will meet on Tuesday, August 30. There will be three sessions on that date, at 10 a. m., 2 p. m., and 8 p. m., respectively.

The sessions will be held in ball room (main floor), Hotel Sinton.

The following matters will be considered:

(1) Reports from each local and state bar association on its activities during the past year, with special reference to the following questions:
   1. What are state and local bar associations doing to impress upon the people of their states and communities the vital importance of respect for the law?
   2. How can the influence of such associations in that field be increased?
   3. What are the state and local bar associations doing to promote knowledge and understanding on the part of the people of their states and communities of the fundamental principles of American institutions?

(2) Report on the matter of State Bar Organization.

(3) Discussion of the question—"The Duty and Responsibility of the Bar in the Selection of the Judiciary." The discussion on this question will be led by William D. Guthrie, Esq., for many years Chairman of the Judiciary Committee of the Association of the Bar of the City of New York.

(4) Conference on Professional Ethics, under the auspices of the Committee on Professional Ethics and Grievances of the American Bar Association. This conference will take place at the evening session.

(5) Election of officers.

COMPARATIVE LAW SECTION

The session will be held in Parlor G (mezzanine floor), Hotel Sinton, Wednesday afternoon, August 31, at 2:30 o'clock. It will be open to the public. (The Council will meet at 2 p. m. same day in Parlor G (mezzanine floor), Hotel Sinton.

Robert P. Shick, Secretary of Section, will preside.

The order of business will be as follows:

Statement of the Chairman as to organization of the Section.
Treasurer's Report.
Address by Hon. Manoel de Oliveira Lima, of Brazil, "New Constitutional Tendencies in Latin America."
Election of Officers and Council.
New Business.
Membership of the Section is of three classes:
Class A.—All members of the American Bar Association upon enrollment.
Class B.—State Bar Associations, Law Schools, Law Libraries, Institutions of Learning, City and County Bar Associations, upon approval, to send two delegates each.
Class C.—Distinguished foreign jurists, legislators or scholars elected as honorary members.

JUDICIAL SECTION

The Section will hold its first session on Tuesday, August 30, 2:30 p. m., in Rooms 5 and 6 (ball room floor), Hotel Gibson.

Charles A. Woods, of South Carolina, Chairman of the Section, will preside.

The Section will hold its second session on Wednesday, August 31, at 2 p. m., in Convention Hall, Hotel Gibson. An informal address will be delivered by William Howard Taft, Chief Justice of the United States.

SECTION OF PATENT, TRADE-MARK AND COPYRIGHT LAW

The session will be held in Parlor H (mezzanine floor), Hotel Sinton, on Wednesday, August 31, 2 p. m.

A. C. Paul, of Minnesota, Chairman of the Section, will preside.

Address—A. C. Paul, Chairman.

Report of Committee on Revision of United States Trade-Mark Statutes—Edward S. Rogers, of Illinois, Chairman.

Discussion.

A meeting of the Council of the Section has been called for Tuesday, August 30, at 2 p. m., Hotel Sinton.

SECTION OF LEGAL EDUCATION

The Section will hold its first session in Rooms 3 and 4 (ball room floor), Hotel Gibson, on Tuesday, August 30, 2:30 p. m.

The second session of the Section will be held in Rooms 3 and 4 (ball room floor), Hotel Gibson, on Wednesday, August 31, at 2 p. m.

Elihu Root, of New York, Chairman of the Section, will preside.

FIRST SESSION.

Annual address of Elihu Root, chairman of the Section.
Report of Secretary.
Report of Council.

SECOND SESSION.

Presentation and discussion of report of Special Committee as to action to be taken to strengthen the character and improve the efficiency of those admitted to the practice of law.
Election of Officers.

SECTION OF PUBLIC UTILITY LAW

The fourth annual meeting of the Section will be held in Room 7 (ball room floor), Hotel Gibson, on Tuesday, August 30, 1921.

There will be three sessions of the Section: 10 a. m., 3 p. m., and 8 p. m.

Bentley W. Warren, Chairman of the Section, will preside.

Tuesday, August 30, 10 A. M.

Announcement of death of Stephen S. Gregory, of Illinois, member of the Council of the Section. Memorial address by William H. Burges, of Texas.
Address of Bentley W. Warren, of Massachusetts, Chairman.
Report of Secretary.
Appointment of Committees.
Address, "Public Utility Regulations in Ohio, with Special Reference to Street Railroads," by Joseph Wilby, of Ohio.
Discussion.
Questions submitted by members of the Section of which discussion is desired:

(a) Under what circumstances is a provision in a municipal franchise fixing rates legally binding upon a utility and a municipality, and to what extent?

(b) May a utility under the law fix a rate above the value of the service, so long as it does not exceed an adequate return?

(c) How can the value of the service be ascertained to meet the legal requirement?

(d) Is the present value of the property, in view of the high prices, a proper basis for a commission to fix rates?

(e) What is the legal duty of a commission, when a rate of return formerly adequate has become by reason of higher interest paid investors no longer attractive to capital?

(f) Should not a sliding scale of rates, depending on factors of cost, be fixed so as to adjust themselves from time to time to meet the legal rule of a reasonable rate and fair return?

(g) Should public service automobiles on highways be allowed to operate in competition with street railways, and if so, to what extent, and may such service lawfully be carried to the supplanting of such railways?

(h) What will the effect of the general use of public service automobiles on highways carrying passengers and freight, be upon street railways and steam railroads, respectively, and how far may or should they be legally restrained, if at all?

(i) In commission hearings how far is it wise to disregard legal rules of evidence, under the legislative permission not to "be bound by the technical rules of legal evidence?"

Miscellaneous business.

Tuesday, August 30, 3 P. M.

Address, "Transit Tendencies in New York City," by LeRoy T. Harkness, of New York.
Discussion.
Discussion of subjects submitted at morning session.
Reports of Committees.
Election of Officers.
Miscellaneous business.

Tuesday, August 30, 8 P. M.

Address, "Legal and Practical Aspects of Co-operative Use of Carriers' Facilities," by A. G. Gutheim, of District of Columbia.
Paper, "Some Legal Aspects of the New York Harbor Problem and Its Interstate Relation," by Julius Henry Cohen, of New York.
Discussion.
Continuation of discussion of subjects submitted at morning session.
Miscellaneous business.
Adjournment.

SECTION OF CRIMINAL LAW

The first annual meeting of the Section will be held in Parlor H (mezzanine floor), Hotel Sinton, on Tuesday, August 30. There will be two sessions of the Section: 2:30 p. m. and 8:30 p. m.

Tuesday, August 30, 2:30 P. M.

Address of Welcome—Hon. Nelson Schwab, Assistant District Attorney, Cincinnati.
President's Address—Hon. Ira E. Robinson, Grafton, W. Va.
Discussions—"Reforms in Criminal Procedure."
Report of Secretary-Treasurer—Edwin M. Abbott, Philadelphia, Pa.

Tuesday, August 30, 8:30 P. M.

Paper—"Should Verdicts Be Unanimous in Criminal Cases?"—Hon. James R. Clark, U. S. District Attorney, Cincinnati.
Discussion.
Paper—Hon. E. W. Sims, former U. S. District Attorney, Chicago, Ill.
U. S. Senator Seldon P. Spencer, of Missouri, and Dr. William Healey, of Boston, Mass., will also discuss "Reforms in Criminal Legislation."

COMMISSIONERS ON UNIFORM STATE LAWS

The thirty-first annual meeting of the National Conference of Commissioners on Uniform State Laws will be held in Cincinnati, Ohio, August 24 to 30, 1921, at the Hotel Gibson (Convention Hall), just preceding the meeting of the American Bar Association.

Wednesday, August 24

10:00 A. M. Meeting of the Executive Committee.
2:00 P. M. FIRST SESSION.
Address of Welcome.
Response of the President.
Roll Call.
Reading of the Minutes of the Last Meeting.
Address by President Henry Stockbridge.
Report of the Secretary.
Report of the Treasurer.
Report of the Executive Committee.
Appointment of Nominating Committee.
Appointment of Auditing Committee.
8:00 P. M. SECOND SESSION.
Reports of Standing Committees:
Scope and Program Committee.
Publicity Committee.
Legislative Committee.
Committee on Appointment of and Attendance by Commissioners.
Presentation and consideration of the reports of the following special committees not presenting drafts of Acts:
Insurance.
Prohibition.

Drug Law.
Securing Compulsory Attendance of Non-Resident Witnesses in Civil and Criminal Cases.
Automobile Legislation.
One Day's Rest in Seven.
Depositions and Proof of Statutes.
Tribunal to Settle Industrial Disputes.
Cooperation with the American Judicature Society.
Cooperation with the American Institute of Criminal Law and Criminology.
Uniformity of Judicial Decisions.
Occupational Diseases.
Marking and Labeling.
Registration of Title to Land.
Primary Law for Federal Officers.
Marriage and Divorce.
Report of Nominating Committee.
Election of Officers.

Thursday, August 25

9:30 A. M. THIRD SESSION.
Consideration of Eighth Tentative Draft of a Uniform Incorporation Act.
2:00 P. M. FOURTH SESSION.
Consideration of Eighth Tentative Draft of a Uniform Incorporation Act.
8:00 P. M. FIFTH SESSION.
Consideration of:
Eighth Tentative Draft of a Uniform Incorporation Act.
Report of Commercial Law Committee on amendments to the Warehouse Receipts and Bills of Lading Acts.
Report of Commercial Law Committee on a Blue Sky Law.

Friday, August 26

9:30 A. M. SIXTH SESSION.
Consideration of First Tentative Draft of a Uniform Fiduciaries Act.
2:00 P. M. SEVENTH SESSION.
Consideration of First Tentative Draft of a Uniform Fiduciaries Act.
8:00 P. M. EIGHTH SESSION.
Consideration of First Tentative Draft of an Act relating to the Status and Protection of Illegitimate Children.

Saturday, August 27

9:30 A. M. NINTH SESSION.
Consideration of Second Tentative Draft of a Uniform Declaratory Judgments Act.
2:00 P. M. TENTH SESSION.
Consideration of Second Tentative Draft of a Declaratory Judgments Act.
(At 4:30 P. M. the Conference adjourns for local entertainment.)

Monday, August 29

9:30 A. M. ELEVENTH SESSION.
Consideration of First Tentative Draft of a Uniform Mortgage Act.
2:00 P. M. TWELFTH SESSION.
Consideration of First Tentative Draft of a Uniform Aviation Act.
8:00 P. M. THIRTEENTH SESSION.
Consideration of Report of the Committee on Compacts Between States.

Tuesday, August 30

Unfinished business.

ASSOCIATION OF ATTORNEYS GENERAL

All Sessions at Parlor F, Hotel Sinton

Monday, August 29, 2 P. M.

Call to Order and Opening Remarks—Byron S. Payne of South Dakota, Vice-President, and acting President of the Association.
Addresses of Greeting by Representative of Cincinnati Bar Association, and John O. Price of Ohio.
Response to Greetings, by Samuel C. Wolfe of South Carolina.
Address: "Lights and Shadows of the Attorney Generalship," J. S. Utley of Arkansas.

Monday, August 29, 8 P. M.

Address: "Impartial Enforcement of Law," William Lemke of North Dakota.
Address: "The Attorney General's Office and Law Enforcement," Ulysses S. Lesh of Indiana.

Tuesday, August 30, 10 A. M.

Address: "Common Law Certiorari in Rate Litigation," Frank Roberson of Mississippi.
Address: "Inheritance Taxation," Chas. I. Dawson of Kentucky.

Tuesday, August 30, 2 P. M.

Round Table Discussions:
"Open Price Associations"—Discussion led by Jesse W. Barrett of Missouri, and Clifford L. Hilton of Minnesota.
"The Federal Water Power Law"—Discussion led by Ransford W. Shaw of Maine, and Richard J. Hopkins of Kansas.
(The above subjects were suggested by members for discussion. Invitation is given to suggest other subjects for discussion at the meeting. Notify the acting President.)

Business Session

Reports and election of officers.

Entertainments

ANNUAL DINNER

The Annual Dinner of the Association will be given in the ball room, Hotel Gibson, on Friday, September 2, at 7 p. m. William H. Taft, of Connecticut, will preside.

A dinner will be given at the same hour in the Ball Room, Hotel Gibson, to the ladies who accompany members and guests of the Association. *Tickets for the dinner to the ladies may be obtained at the Treasurer's office.*

EXCURSIONS

Details of excursion on *Thursday afternoon* to be announced later.

On Saturday, September 3, an all-day excursion to Dayton, Ohio, will be given by the Montgomery County Bar Association to members and guests of the American Bar Association and ladies accompanying them.

Informal program will include:

(a) Inspection of airplane activities centering here in "the birthplace of aviation," with airplane rides for those desiring, and such test by flight and otherwise as will demonstrate the immediate need of state and national legislation regulating aeronautics.

(b) Inspection of comprehensive flood prevention project, including reservoir dams, now nearing completion in the Miami valley.

(c) Complimentary luncheon and automobile ride for all guests.

4 P. M. Informal meeting at N. C. R. School House. Addresses. General discussion on the subject of the Law of Aviation.

5:30 P. M. Lawn party and supper at "Far Hills," suburban home of John H. Patterson, president of the National Cash Register Company.

7:30 P. M. Special train returning to Cincinnati.

Excursion tickets may be obtained at the Treasurer's office.

Meeting of Secretaries

A meeting of the Secretaries of the various State Bar Associations will be held at the Hotel Sinton, Cincinnati, Ohio, at 12:30 p. m. on August 30, 1921, when an informal luncheon will be served. Thereafter the various subjects for discussion will be pre-

sented. The purpose of the meeting is to bring about a closer understanding and co-operation among the Secretaries of the State Bar Associations.

Consolidated Program*

MONDAY, AUGUST 29

10:00 a. m. Offices Secretary and Treasurer open for registration of members and delegates and sale of tickets to annual dinner—tea room, main floor, Hotel Sinton.
2:00 p. m. Meeting National Association of Attorneys General in Parlor F, mezzanine floor, Hotel Sinton.

TUESDAY, AUGUST 30

10:00 a. m. Meeting of Conference of Bar Association Delegates in ball room, main floor, Hotel Sinton.
" Meeting of Section of Public Utility Law, room 7, ball room floor, Hotel Gibson.
" Meeting National Association of Attorneys General, parlor F, mezzanine floor, Hotel Sinton.
12:30 p. m. Meeting and luncheon of Secretaries of State Bar Associations, Hotel Sinton.
2:00 p. m. Meeting of Conference of Bar Association Delegates, ball room, main floor, Hotel Sinton.
" Meeting of Council of Section of Patent Trade-Mark and Copyright Law, parlor H, mezzanine floor, Hotel Sinton.
2:30 p. m. Meeting of Judicial Section in rooms 5 and 6, ball room floor, Hotel Gibson.
" Meeting of Section of Legal Education, rooms 3 and 4, ball room floor, Hotel Gibson.
" Meeting of Section of Criminal Law, parlor H, mezzanine floor, Hotel Sinton.
" Meeting of National Association of Attorneys General, parlor F, mezzanine floor, Hotel Sinton.
3:00 p. m. Meeting of Section of Public Utility Law, room 7, ball room floor, Hotel Gibson.
8:00 p. m. Meeting of Conference of Bar Association Delegates, ball room, main floor, Hotel Sinton.
" Meeting of Section of Public Utility Law, room 7, ball room floor, Hotel Gibson.
8:30 p.m. Meeting of Executive Committee, parlor F, mezzanine floor, Hotel Sinton.
" Meeting of Section of Criminal Law, parlor H, mezzanine floor, Hotel Sinton.

WEDNESDAY, AUGUST 31

9:00 a.m. First meeting of General Council in parlor F, mezzanine floor, Hotel Sinton.
10:00 a. m. First session of American Bar Association, ball room, Hotel Sinton.
2:00 p.m. Annual business meeting of Ohio State Bar Association, ball room, main floor, Sinton.
" Meeting of Council of Comparative Law section, parlor G, mezzanine floor, Hotel Sinton.
" Meeting of Section of Patent, Trade-Mark and Copyright Law, parlor H, mezzanine floor, Hotel Sinton.
" Meeting of Section of Legal Education, rooms 3 and 4, ball room floor, Hotel Gibson.
" Second session Judicial Section, Convention Hall, Hotel Gibson.
2:30 p.m. Meeting of Comparative Law Section, parlor G, mezzanine floor, Hotel Sinton.
4:00 p. m. Joint session of American Bar Association and Ohio State Bar Association, ball room, Hotel Sinton.
8:00 p. m. Second session of American Bar Association.

THURSDAY, SEPTEMBER 1

10:00 a. m. Third session of American Bar Association.
2:30 p. m. Excursion.
8:00 p. m. Fourth session of American Bar Association.

FRIDAY, SEPTEMBER 2

10:00 a. m. Fifth session of American Bar Association.
2:30 p. m. Sixth session of American Bar Association.
7:00 p. m. Annual dinner by American Bar Association, ball room, Hotel Gibson.
" Dinner to ladies, ball room, Hotel Gibson.

SATURDAY, SEPTEMBER 3

All day excursion to Dayton, Ohio.

*Commissioners on Uniform State Laws not included.

HOTEL ACCOMMODATIONS IN CINCINNATI, OHIO

(All hotels European plan, except as stated. Prices named are per day.)

Name	Location	Single room and bath	Double room and bath
Hotel Gibson .	4th and Walnut...	$2.50 up	$4.25 up
Hotel Sinton .	4th and Vine.....	3.50 up	5.50 up
Havlin Hotel..	Vine & Opera Pl..	3.00 up	5.00 up
Hotel Metropole	6th and Walnut...	2.50 up	4.50 up
Grand Hotel .	4th and Central...	2.50 up	4.00 up
Palace Hotel .	6th and Vine.....	2.00 up	3.00 up
Emery Hotel .	421 Vine	2.50	4.50
Hotel Alms .. (Amer. plan)	McMillan & Alms Place	4.00	7.00

Mr. Ben B. Nelson, Fourth National Bank Building, Cincinnati, Ohio, has charge of reservations for members and guests. In writing to Mr. Nelson please state:

a. Preference of hotels;
b. Time of arrival;
c. Period for which rooms are desired;
d. Whether single or double room desired;
e. How many persons will occupy each room.

Members who wish to do so are at liberty to make direct arrangements with hotel preferred.

Make your reservations early. Notify Mr. Nelson promptly of any cancellations.

Samuel Worcester Dana

Samuel Worcester Dana died at his home in New Castle, Penn., January 1, 1921, of pneumonia. Mr. Dana would have been ninety-three in March 1921. He remained in active practice nearly up to the time of his death. He was the oldest attorney in Pennsylvania in point of admission to the Bar, and had been a member of the American Bar Association since 1889. In the September issue of the JOURNAL a note was made of his long membership, which it was stated, apparently entitled him to be called the "Dean of the Association."

Mr. Dana was born in Amherst, Mass., March 14, 1828, was admitted to the Bar in 1853 and to practice before the Supreme Court of Pennsylvania in 1855. Mr. Dana was a man of broad general culture and maintained the classical traditions of the old school. He was a frequent writer and speaker on subjects of timely interest. Further details of his career will be found in the article in the JOURNAL above referred to. He leaves an only son, Richard F. Dana, to survive him.

Judge William Story

Judge William Story of Salt Lake City, one of the leading lawyers of the state, died on June 20, at seventy-eight years of age. Judge Story was born in Waukesha County, Wisconsin, in 1843, studied law at Michigan University, and in 1864 was admitted to the Wisconsin Bar. He saw service during the war and soon after its conclusion moved to Arkansas to practice law. He served on the Circuit Bench in that state, resigning the position to accept the appointment of Judge of the United States District Court for the Western District of Arkansas. Some years later he moved to Colorado, of which state he was Lieutenant Governor from 1891 to 1893. In September, 1909, he formed a partnership for the practice of law in Salt Lake City, and continued in active practice in both Colorado and Utah.

ACTIVITIES OF STATE BAR ASSOCIATIONS

Secretaries of State Bar Associations are requested to send in news of their organizations. "News" means not only official statements of time, place and programs of regular meetings and the action there taken, but also reports of other interesting activities. In brief, anything showing what the membership, committees and leaders in the State Bar Association are thinking and doing with respect to matters of professional interest.

Secretaries can help to make this department one of the most interesting in the Journal. The collection of reports will enable each State Bar Association to see every month what the others are doing and to avail itself of any suggestion contained in their activities. Contributions should be mailed not later than the 25th of each month and should be addressed to the editorial office, 1612 First National Bank Building, Chicago.

ARKANSAS

Plan to Organize County Associations

At the meeting of the State Association at Hot Springs, June 2 and 3 the members, among other things, discussed the advantages to members of the bar in having units consisting of county bar associations, and delegated to the executive committee of the State Bar Association authority to assist in organizing such county bar associations.

The advantages of county bar associations, it was agreed, will be great in keeping the lawyers in the counties in closer touch with each other and in elevating professional standards and promoting generosity and chivalry in their relations. It is hoped that the plan to organize county bar associations will meet with a hearty response from the lawyers in the state. Some of the county bar associations now hold monthly meetings, at which a person previously designated reviews the important decisions of the United States and State Supreme Courts, and a part of the program is a discussion of these decisions.

The President's annual address was delivered by W. F. Colman, of Pine Bluff, on "The Crime Wave." Mr. J. M. Futrell, of Paragould, read a paper on "The Administration of the Executive Department," and Ex-Governor Frank O. Lowden, of Illinois, spoke on "The American Principle of Government."

The following officers were elected for 1921-22: J. F. Loughborough, Little Rock, President; J. Vol Walker, Fayetteville, Vice-President; J. Merrick Moore, Little Rock, Treasurer; Roscoe R. Lynn, Little Rock, Secretary.

IOWA

Bar Association Shows Large Membership

At the twenty-seventh annual meeting of the Iowa State Bar Association, at Waterloo, Iowa, on June 23 and 24, 330 lawyers were in attendance. One hundred and fifty new members were added at this meeting, making the total membership of the Association over 1,220. This represents perhaps a larger proportion of the total membership of the bar in active practice in the state than in any other similar state association. Of this number, only about 20 are behind in the payment of dues.

The Association refused to adopt a resolution asking for the enactment of a statute requiring all active practicing attorneys in the state to be members of the Bar Association. The Association went on record as recommending the following procedural changes:

1. That in all cases an equitable demurrer must be specific.
2. That appeals to the Supreme Court be required to be taken within three months from the date of judgment or decree.
3. That no appeals in civil actions could be taken to the Supreme Court where the amount involved is less than five hundred dollars without a certificate of the District Court.
4. That a final decree of distribution definitely establishing the rights of all parties shall be entered in all probate proceedings.
5. That on appeal to the Supreme Court no printed abstract shall be required, but that the appellant shall file with the Clerk of the Supreme Court the transcript in the case and that each party shall state in the printed argument so much of the record only as is essential and necessary to present the questions raised on appeal.
6. That actions may be brought at any time upon proper notice, without reference to term time, and that issues may be made up in vacation.

The Association refused to recommend the following propositions which were submitted:

1. That trial courts be authorized by statute to permit a jury, after a cause has been submitted to it, to adjourn before reaching a verdict and separate, without being in charge of an officer, and reconvene for further deliberation.
2. That the State be permitted to secure a change of venue in the trial of criminal cases upon the same conditions that such change is allowed to a defendant.
3. That a probate court be created in each county with jurisdiction in all probate matters.
4. That the Code be amended by striking therefrom the provision that the attorney or attorneys for the State shall not during the trial of a criminal case refer to the fact that the defendant did not testify in his own behalf.

Mention was made of the principal addresses at the meeting in the July issue of the JOURNAL.

The twenty-eighth annual meeting is to be held at Sioux City, Iowa, on June 22 and 23, 1922.

LOUISIANA

President Spearing Addresses Appeal to Bench and Bar

President J. Zach. Spearing of the State Bar Association has addressed an appeal to the Bench and Bar of Louisiana in an effort to increase the membership. He urges every worthy member of the profession to join the Association and points out the added influence that will come to the profession from an organization which is properly supported.

He states that the recent meeting, held in Shreveport on June 3 and 4, was very successful from every point of view except that of attendance. He adds that "there was a lamentable absence of members of the Bar as well as of those honored by being chosen for the Bench. The one compensating effect of the small number present was to impress upon those who were there how essential it is to awaken interest in the Association and to increase its membership, and to make it a real factor for good in the legal profession, and a benefit to the State."

The principal address was by Hon. Arthur A. Ballantine, of the New York City Bar, on "Practical Aspects of Federal Income Taxation." Mr. Henry P. Dart, former President, read a paper on "History of Louisiana Law," and Mr. Edward Rightor, of the New Orleans Bar, spoke on "The Inheritance Tax Law of Louisiana."

The following officers were elected: J. Zach Spearing, New Orleans, President; William W. Westerfield, New Orleans, Vice-President, First District; Fred G. Hudson, Jr., Monroe, Vice President, Second District; Horace H. White, Alexandria, Vice-President, Third District; Ventress J. Smith, New Iberia, Vice-President, Fourth District; W. W. Young, New Orleans, Secretary-Treasurer.

The Executive Committee is composed of the above-named officers and Albin Provosty, New Roads; John C. Davey, New Orleans; Walter L. Gleason, New Orleans; Delvaille H. Theard, New Orleans; John Dymond, Jr., New Orleans.

NORTH CAROLINA

Twenty-Third Annual Meeting of Association

The twenty-third annual meeting of the North Carolina Bar Association was held July 5, 6 and 7, at Selwyn Hotel, Charlotte, N. C., where addresses were delivered by the President, Mr. Thomas W. Davis, of Wilmington, on "The Bar, Its Benefits and Its Blessings;" by Mr. I. M. Bailey, of Jacksonville, on "The Bar Association's Influence on Young Lawyers;" and by Mr. Thomas C. Guthrie, of Charlotte, on "The Influence of Lawyers." The annual address was delivered by Mr. Junius Parker, of the New York Bar, on "Increasing Governmental Activities."

The newly elected officers are: President, John A. MacRae, Charlotte; Vice-Presidents, H. L. Stephens of Warsaw, E. E. Raper of Lexington, J. W. Pless of Marion; Henry M. London, of Raleigh, Secretary and Treasurer.

The delegates to the American Bar Association are: H. F. Seawell, of Carthage; Chief Justice Walter Clark and W. E. Brock, of Wadesboro. The alternates are: T. T. Hicks, of Henderson; W. M. Hendren, of Winston-Salem; and Frank Thompson, of Jacksonville.

The delegates to the conference of state and local bar associations are: W. P. Bynum, of Greensboro; Clement Manly, of Winston-Salem; Thomas W. Davis, of Wilmington; while the alternates are Thomas C. Guthrie, of Charlotte; G. S. Bradshaw, of Greensboro; and E. S. Parker, of Graham.

As members of the Executive Committee there were elected R. L. Smith, of Albermarle, and A. L. Quickel, of Lincolnton, who with the President, the Secretary, E. W. Timberlake, of Wake Forest (1922), Frank Thompson, of Jacksonville (1922), Mark W. Brown of Asheville (1923), and E. S. Parker of Graham (1923), compose the Executive Committee.

PENNSYLVANIA

Criminal Law Administration, Public Utilities and Welfare Legislation Discussed

The meeting of the Pennsylvania Bar Association was held at Asbury Park, New Jersey, June 28, 29 and 30. The annual address was delivered by Hon. J. A. Brown, ex-Chief Justice of the Supreme Court, who retired on the first Monday of January of this year because of the expiration of his term of twenty-one years. Mr. Harley F. Carr of the Camden, New Jersey, Bar read a paper on the subject of the "Regulation of Public Utilities." Prof. Edwin R. Keedy, of the University of Pennsylvania, who served during the war as a Lieutenant Colonel in the Judge Advocate General's Department, read a paper on "The Administration of the Criminal Law." The program also included a paper by Mrs. J. Willis Martin of Philadelphia, on "Welfare Legislation."

The reports of the committees constituted one of the most interesting and important features of the session. The Committee on Uniform State Laws reported that the legislature of 1921 had passed, and the Governor had approved, three acts prepared by the National Conference of Commissioners on Uniform State Laws and recommended to the states for adoption. These were an act concerning the proof of statutes of other jurisdictions; an act concerning the taking of depositions in this state to be used in foreign jurisdictions, and an act concerning fraudulent conveyances. The legislature also passed the Conditional Sales Act, but it was vetoed by the governor on the ground that its adoption in Pennsylvania would "create uncertainty and confusion." This report gives an interesting account of the character and work of the National Conference of Commissioners on Uniform State Laws.

The majority of the committee to consider the advisability of recommending the adoption of a chattel mortgage act in Pennsylvania concluded that such legislation should be passed. Nearly every other state in the union has such a law and the committee believed that conditions would justify its passage in Pennsylvania.

The report of the committee on admissions went into the whole membership situation, recommended special attention to the social and recreational side of the annual meetings, declared in favor of making a special effort to have every county in the state well represented in the membership, and approved the effort to furnish individual service to members, as illustrated in the weekly "legislative information service," sent by the secretary gratuitously to every member of the Association during the recent session of the General Assembly.

SOUTH DAKOTA

The program for the two-day meeting of the State Bar Association at Watertown, August 3 and 4, included the President's address by Claude L. Jones, of Parker; the annual address by Robert W. Stewart, of Chicago; an address by William M. Potts, of Mobridge on "Economic and Judicial Consideration of Hydro-Electric Apropos Chapter 257, Laws 1921;" an address by John Howard Gates, of the Supreme Court of South Dakota, on "Small Claims Court Procedure;" an address by George Philip, of Rapid City, on "The Tendency of our Profession;" and an address by James Brown, of Chamberlain, on "The Bench and the Bible."

The special committee on the adoption of a proposed amendment to the Constitution authorizing the legislature to fix the salary of state officers was also scheduled to report.

TEXAS

Many Members to Attend Cincinnati Meeting

Our last annual meeting was held in the City of San Antonio for three full days, July 4, 5 and 6. The attendance was the largest in the history of the Association and the interest manifested greater than it has ever been before.

Under an amendment of the Constitution of our Association, made last year, the address of the President, Mr. Claude Pollard, of Houston, did not consist of a discussion of recent legislation and decisions. The subject of his address was "Beginnings of Texas History" and he traced the history of the Government of Texas up to the time of the admission of the State into the Union.

In attendance upon our meeting was Mr. Henry M. Bates, Dean of the Law Department of the University of Michigan, who delivered an able and much appreciated address on the subject of "The Constitution and Nationalism."

Hon. John D. Grace, of New Orleans, delivered an able address upon "Admiralty and Maritime Law."

We also had the good fortune to secure the attendance of Judge Benito Flores, one of the Justices of the Supreme Court of the Republic of Mexico, who delivered an address upon certain features of the Mexican Constitution.

In addition to these addresses, there was one by Mr. Rhodes S. Baker of Dallas upon the "Dangerous Trend of Nationalism."

Deep interest is being manifested on the part of the lawyers of Texas in the growth and usefulness of our Association and in the progress of the American Bar Association. The Texas Bar will have a great many of its members in attendance in Cincinnati. Among them may be noted our new President, Honorable Richard Mays of Corsicana, Texas; Ex-President, Claude Pollard of Houston, Texas; Robert W. Stayton, of Corpus Christi; R. E. L. Saner, of Dallas; C. F. Greenwood, of Dallas; Jesse Andrews, of Houston; William H. Burgess of El Paso, and a number of others.

BEN F. WILSON, Sec.

WASHINGTON

Favors State and American Bar Association Affiliation Plan

The Washington State Bar Association is alive. At our annual convention at Olympia, July 21-23, 1921, sixteen per cent of our membership was present at some one of our meetings, and ten per cent of our membership was present at the banquet table the night of July 22. Our members comprise sixty per cent of the practising lawyers of the State. One year ago, working under the old membership plan, we had probably 150 members in good standing, and left the convention $193 in debt, but under the affiliation plan we reported this year a balance in the treasury of $403, twelve hundred members in good standing, delinquent report for 1918 published and distributed, delinquent report for 1919 ready to go to press, report for 1920 published, and promised the members that within thirty days the 1921 report would be printed.

The following recommendations of the secretary were unanimously adopted:

> That the Washington State Bar Association request the American Bar Association at its forthcoming session for 1921 to consider the taking of action looking toward the adoption of a plan by which members of the state bar associations may become members of the American Bar Association when such state associations are so organized that membership therein can be obtained only through membership in various local or county societies of such state. That the Washington State Bar Association instruct its delegates to the 1921 convention of the American Bar Association to urge adoption of such plan by the American Bar Association.

It is hoped that there will be such interest taken in the affiliation plan as to make its early adoption certain. We have found it good. We wish to extend it nationally.

The following-named persons were elected: President, C. R. Hovey, Ellensburg; Secretary-Treas., W. J. Millard, Olympia; Delegates to the American Bar Association, O. B. Rupp, Seattle; W. J. Millard, Olympia; Reeves Aylmore, Jr., Seattle.

The President of the Tacoma Bar Association invited the State Association to convene in Tacoma in 1922, which invitation was unanimously accepted.

Tell it in the streets of Gath, yes, shout it in the streets of any city of the Union, that Washington State Bar Association is very much alive. We have the climate, we have the scenery, we have the convention hall, we have the hotels, we have every thing that makes a convention State, so why would it not be a good thing for the East, the North, the South and the West to meet in the West in 1922? It is time that the American Bar Association gave us an opportunity to entertain them. We can offer everything that will make a successful convention, not forgetting the banquet.

W. J. MILLARD, Sec.

WISCONSIN

Delegates Appointed to Cincinnati Meeting

The period just succeeding the Annual Meeting is naturally a quiet one and there have not been many activities of sufficient importance to report. The president has appointed a committee consisting of Mr. George E. Morton of Milwaukee, Chairman, Hon. Henry C. Lockney, Waukesha, and P. J. Myers, Racine, to consider and report at the next annual meeting upon the annual address of ex-President Thompson, which address dealt with the subject of bar organization.

The members of the standing committees, whose terms expired this year, have all been reappointed, with the exception of Mr. John C. Thompson of Oshkosh, on the Publication Committee. Hon. T. S. Nolan was appointed to succeed Mr. Thompson on this committee; Mr. Thompson having been elected at the annual meeting to take the chairmanship of the Judicial Committee in place of Hon. R. D. Marshall, resigned.

The following have been appointed as delegates and alternates to represent the Association at the annual meeting of the American Bar Association, Aug. 31 to Sept. 2, inclusive: Delegates—John C. Thompson, Oshkosh; Wm. A. Hayes, Milwaukee; F. R. Bentley, Baraboo. Alternates—John B. Sanborn, Madison; S. G. Gordon, La Crosse.

It is expected that a meeting of the Executive Committe of the Association will be called soon at which will be taken up, among other things, the question of publishing the proceedings of the last three years, which will probably all be included in one volume.

LETTERS FROM BAR ASSOCIATION MEMBERS

The Real Wealth of America

New Hamburg, N. Y., July 24.—To the Editor: In the JOURNAL for July, 1921 (page 361), is the following statement of Professor James H. Tufts:

> The general operation of the economic system was to place sixty per cent of the wealth of the country in the hands of two per cent of the population.

This statement is one of the fallacies which we frequently find in the writings of professors and which have done a great deal to create, and even more to stimulate popular discontent. The source of this fallacy is the attaching of undue importance to assessed valuation for purposes of taxation. Persons familiar with the practical conduct of the officers having the power of assessment know that the tendency is in most cities to assess property at its full value and in the country to undervalue the same. When, for example, the state tax in the State of New York was mainly collected by an assessment on real estate values it became necessary to create a board of equalization in order to require the rural counties to pay a more equitable share of the state tax.

When, however, the United States Income Tax Law was enacted and Federal officials in every State were charged with the duty of administering the law uniformly, we did get reliable statistics. Even these discriminate in favor of the farmer. He earns his living on his own place, he is not chargeable as income with its rental value, nor is he charged as income with the value of the fruits of his labor, which he consumes. But the income tax returns do show conclusively that sixty per cent of the wealth of the United States is not held by two per cent of the population, and that, in point of fact the majority of the people own the majority of the property.

Another source of error in the computations on which the professor's figures are based arises from the failure to account for the myriad small estates. These do not get into the Probate Courts, they are settled by the family without any need of legal proceedings. Their aggregate is great. The failure to take them into account is similar to the logic of a man who would declare that Woolworth could not have made any money from selling articles for five or ten cents. He did, however, amass a fortune out of the minute profits on each of a multitude of articles. In like manner the aggregate of these small estates is great although the figures of them never get into the Probate Court.

The income tax returns for the fiscal year 1917 show the following in regard to persons having a taxable income (over and above the exemption) of not over five thousand dollars:

Income	*No. of persons*	*Aggregate Income*
$1,000 to $2,000	1,640,758	$2,461,137,000
2,000 to 3,000	838,707	2,064,977,328
3,000 to 5,000	560,763	2,115,864,601
Total number of persons having taxable incomes under $5,000	3,040,228	
Total of taxable incomes under $5,000		$6,641,978,929

To this total must be added the portions of the income exempted from income tax. Averaging the proportion of persons who are not heads of families and are only entitled to an exemption of $1,000, we find that in the classes just stated the exemption amounted to $5,646,138,000. With this addition the total incomes of persons reported and having an income of less than $5,000 over and above the exemption just stated, amounted in 1917 to $12,288,116,929—over twelve billion dollars.

The same returns show that there were in 1917, 441,562 persons in the United States having taxable incomes of $5,000 and upwards, amounting in all to $7,010,224,278—above seven billion dollars. Making a similar average for the proportion of these who were not heads of families (one-seventh) we find that their income, exempted for the reason before mentioned, was approximately $820,044,000. The total is $7,830,268,278. If this income were equally divided among the 20,880,860 householders in the United States in 1917, it would give to each only $7.19 a week—about a dollar a day for the average family of five, and about twenty cents a day for each person.

The aggregate incomes of these 3,040,228 persons amounts to $12,288,116,929, whereas the total number of persons having a taxable income of between five hundred thousand and a million dollars was only three hundred and fifteen, with a total income of $214,631,270; and the total number of persons having incomes of a million dollars and over was only a hundred and forty one, with a total aggregate income of $306,835,914. From the same returns it appears that in 1917 the total of the taxable incomes from personal service and business was $7,607,107,930. The income from property was a little more than half as much, that is to say, $4,469,901,354. If we were to add to this taxable income from personal services the amount of wages paid which were not taxed, which was certainly as much as six billion dollars (twice that paid in 1910) we should see at once that the wealth of this country is in its earning capacity and not in its investments.

The fundamental objection to statements like these of Professor Tufts is that they are based on an incomplete study of the actual conditions in America. This is a common fault of social reformers, as it was of the students of natural science before Lord Bacon's time. He showed that conclusions could not be safely drawn from speculative theories and that the only solid foundation of true philosophy was a thorough investigation of actual facts. It is just as necessary to apply this rule to the study of social science. Many men who observed the great power of business organizations jumped at the conclusion, as Professor Tufts does, that they were all-powerful. Actual personal study for sixty years of social conditions in America, has convinced me that these generalizations are based upon insufficient induction.

The America I know is an America where the opportunity to improve is offered to every man. Men have different powers and are fitted for different occupations. The American theory is that each in his own fitting place deserves respect, is entitled to equal consideration in the matter of his civil rights and to protection in the enjoyment of the fruits of his industry, whether those fruits be more or less. If they be more he should use them for the

good of the community, but he is not to be condemned because his skill and executive ability have enabled him to accumulate wealth. This is undoubtedly a great power; like all other powers it may be abused and its abuse should be restrained by law, and in the main has been in this country though not always. But many of our captains of industry have used their wealth in a way that has been productive of countless benefits to the people of this country and in many cases to the people of other countries.

There is no more graphic description of the American conditions than is to be found in two books that I wish every American might read: "The Promised Land," by Mary Antin, and "The Memoirs of Rev. Mr. Rihbany." The first was a Jewess and the second an Armenian. Both came to this country poor; they found the doors of opportunity open to them; they have risen to positions of usefulness and honor. No American born has ever eulogised our American freedom and the opportunities it affords to all men more warmly than these two foreigners, who have become genuine Americans. The experience of these two aliens who found a home in America shows us what America really is and should encourage American pessimists to think better of their native land.

EVERETT P. WHEELER.

Reply

Without entering upon the fascinating field of the "fallacies" of "professors" and the "faults of social reformers," I will simply point out that Mr. Wheeler and I are not talking about the same thing. By "wealth" in the sentence quoted from my article I meant accumulated wealth or property; Mr. Wheeler's discussion, so far as it is based on the *Statistics of Income*, relates to income, or else to wealth in the sense of earning capacity. Perhaps my verb "to place" was liable to mislead, for it might suggest the process of distributing money or other goods in weekly or other periodic income, rather than the total result of a system as measured by ownership of property. I used the terminology of the most careful study of the subject thus far made: *The Wealth and Income of the People of the United States* by W. I. King. The "sixty" and "two" were used by King of accumulated wealth. The original studies on which King's estimates were based were not made by professors. They were not based on assessed valuation, which would, of course, be worthless for personal property. They were indeed based chiefly on probate returns, but one who like myself has grown up in a Massachusetts small town and has noted the almost invariable petition for appointment of an administrator or for probate of a will following the death of any head of a family will be inclined to put confidence in the judgment of the Massachusetts investigators that the figures "include all the estates of persons who die possessing property worth taking account of." Wisconsin figures tally closely with those of Massachusetts.

I cannot grasp the logic of Mr. Wheeler's amazing statement that the *"Statistics of Income"* prove conclusively that the majority of the people own the majority of the property." In the analysis which Mr. Wheeler makes his figures would at most go to show that *of those who file income tax returns* the three million having an income under $5,000 have a greater total income (not more property) than the four hundred forty-one thousand having an income greater than $5,000. (Even so he omits any account of the great amount of non-taxable income derived from government and municipal bonds, etc., which are owned largely by the second group.) He overlooks the fact that the great majority of the heads of families (something like four-fifths on the basis of the number of householders cited by Mr. Wheeler) file no returns. How then, can Mr. Wheeler's figures prove anything about their income, to say nothing of their property? And on the face of it, apart from statistics, the statement that a majority of the people own the majority of the property is absurd—unless it means, as, of course, Mr. Wheeler does not mean, that a majority could be so hand-picked by including a very great number of the wealthiest citizens as to include a majority of the property in its ownership. For it certainly cannot mean that the poorer fifty-one millions of the population own more than the richer forty-nine. And if we talk about property, as distinguished from income, the figures on page 14 of the *Statistics*, which show the income derived from property by income classes, indicate that the income from property (as distinguished from income from other sources) of the lower income classes, which include the majority of income taxpayers, is a very small fraction of the total income from property.

As to the distribution of income as distinguished from property, I said nothing. Income is far less unequally distributed than accumulated wealth, and for many purposes is doubtless a fairer basis for judging social conditions. King estimated, on the basis of statistics for 1910, that the poorer half of the population received approximately one-fourth of the income, although it owned only about two per cent of the property. Changes brought about through the war have raised money wages and to a considerable degree real wages of many of the poorer half, but the fact that a majority of the families of the country still file no income return makes other sources than the *Statistics of Income* essential if we are to consider the incomes of the whole population.

My main thought in the paragraph cited by Mr. Wheeler was, of course, the motives in the public mind which led to the adoption of the income tax amendment, and other legislation which was felt to be necessary to control business. As indicating the conviction among thoughtful men that the burden of taxation was at that time unjustly borne, I should like to refer to two articles by a member of Mr. Wheeler's own profession, Mr. Wayne MacVeagh, in the *North American Review* for June, 1906, and February, 1911. Mr. MacVeagh urged a change "before it is too late." Mr. MacVeagh was, to be sure, something of a "reformer," but in view of the activities for which Mr. Wheeler is widely and honorably known outside his profession I wonder if he has not at times come dangerously near being classed as a reformer himself.

The concluding paragraphs touch questions which cannot be properly treated within the limits of a reply. Disregarding personal experiences as unconvincing except to the person himself, the main point is that the public was convinced that certain legislation was needed and that this legislation presented important judicial issues. The public may

have been in error, but the final decision by the court of last appeal is still to be rendered.

JAMES H. TUFTS.

Conflict of Authority on Deductibility of State Inheritance Tax

Boston, Mass., July 25.—To the Editor: In the recent opinion of the Supreme Court of the United States in the case of New York Trust Co. et al v. Eisner, decided May 16, 1921, the constitutionality of the federal estate tax of 1916 was sustained. The court then continued:

> There remains only the construction of the act. The argument against its constitutionality is based upon a premise that is unfavorable to the contention of the plaintiffs in error on this point. For if the tax attaches to the estate before distribution, if it is a tax on the right to transmit or on the transmission at its beginning, obviously it attaches to the whole estate except so far as the statute sets a limit. "Charges against the estate," as pointed out by the court below, are only charges that affect the estate as a whole and, therefore, do not include taxes on the right of individual beneficiaries. *This reasoning excludes not only the New York succession tax*, but those paid to other states, which can stand no better than that paid in New York. *What amount New York may take as the basis of taxation and questions of priority between the United States and the state are not open in this case.*

In the case of Northern Trust Co. v. Lederer (262 Fed. 252), the Circuit Court of Appeals for the Third Circuit held that the Pennsylvania inheritance tax was an estate tax in substance and, therefore, deductible in figuring the federal estate tax. The Supreme Court of the United States refused to issue a writ of certiorari. In the case of Prentiss v. Eisner, Judge A. N. Hand in the district court held that the New York transfer tax was in substance an estate tax (although the opinions of the New York Court of Appeals were somewhat confusing) and, since it was an estate tax and "not a tax on the right of individual beneficiaries," it could not be deducted by the beneficiary on his or her individual income tax return. In the Circuit Court of Appeals, Judge Hand's opinion was affirmed (267 Fed. 19), the court holding that until the New York Court of Appeals decided clearly that it was an inheritance tax on the right of a beneficiary, and not an estate tax which is a general charge against the estate as a whole the federal courts must consider it an estate tax. The Supreme Court of the United States at Washington refused to issue a writ of certiorari in that case.

In view of these decisions, the question naturally arises whether the passage quoted from the Supreme Court of the United States raises any doubt as to their effect as law. The court expressly says that no question as to "what amount New York may take as the basis of taxation and questions of priority between the United States and the state" are open in the case before them. They further say that "charges against the estate" deductible in figuring the federal estate tax

> are only charges that affect the estate as a whole and, therefore, do not include taxes on the right of individual beneficiaries . . . This reasoning excludes not only the New York succession tax, but those paid to other states, which can stand no better than that paid in New York.

It is this last sentence and its bearing on such cases as Prentiss v. Eisner and Northern Trust Co. v. Lederer that is not clear. The sentence does not seem to be consistent either with the opinion of Judge Hand or with the Circuit Court of Appeals in the Prentiss case. On the other hand, the consideration of the matter is so brief and without reference to the reasoning in those opinions that it is not clear whether the court intended to overrule them as to the nature of the New York transfer tax or not.

An examination of the brief for the plaintiffs in error shows that the case of Prentiss v. Eisner both in the district court and in the circuit court of appeals and the case of Northern Trust Co. v. Lederer in the circuit court of appeals were briefly discussed and some passages from them quoted in the printed argument on pages 194-5 and 205-7 of the brief. The brief, however, was a volume of 242 pages and whether or not these cases were discussed in oral argument and called specially to the attention of the court does not appear.

In the Prentiss case both in the district court before Judge A. N. Hand and in the circuit court of appeals and also in the Northern Trust Co. case in the district court before Judge Thompson and in the circuit court of appeals, the case of U. S. v. Perkins was relied on by each court, perhaps, as the controlling authority. In the Prentiss case (260 Fed. 589), Judge Hand stated that the position of the government against allowing the deduction of the New York inheritance tax on the federal income tax return of the beneficiary:

> is in accordance with the decision in U. S. v. Perkins . . . where the court said, "The legacy becomes the property of the legatee only after it has suffered a diminution to the amount of the tax and it is only upon this condition that the legislature assents to a bequest of it."
>
> This decision, which so far as I know has not been questioned, cannot be reconciled with any theory that the tax is based upon a right of succession already vested in the legatee.

He stated that

> The language of the act (of congress) would apparently make transfer taxes a necessary deduction, if they are charges against the person receiving the property or against either the property or the right accruing to him.

He refers to the confusion arising from the New York opinions and then again refers to U. S. v. Perkins saying,

> This case has been received with approval in New York decisions both under the old and new transfer tax acts.

In the circuit court of appeals in a more extended opinion by Judge Rogers, concurred in by Judges Hough and Manton, the conclusion is as follows:

> We admit that the New York cases on the subject of taxable transfers are confused and not always clear and consistent. But until the New York Court of Appeals authoritatively states that the law of New York is not what the Supreme Court of the United States said it was in the Perkins case, this court has no alternative but to hold that the New York transfer tax act does not impose a tax on a legatee's right of succession which is deductible in her income tax return.

The important question arises, therefore, whether the Supreme Court of the United States by the paragraph already quoted intended to overrule much of the reasoning in the Perkins case without mentioning that case or suggesting any intention of reverruling it.

In the Prentiss case the federal courts commented on the confusion as to the nature of the New York tax arising from the opinions of the New York Court of Appeals. A re-reading of the opinions in U. S. v. Perkins above recited and Snyder v. Betman (190 U. S., 249), and the last paragraph in the recent decision in New York Trust Co. v.

Eisner, which is the subject of this discussion, leads one to the conclusion that the New York Court of Appeals does not stand alone in its conflicting utterances on this subject. The court was certainly warned of the probable confusion by the dissenting opinion of Mr. Justice White (later chief justice) in Snyder v. Betman, in which Chief Justice Fuller and Mr. Justice Peckham concurred. Incidentally, Mr. Justice White was the judge who wrote the opinion in Knowlton v. Moore, which is the basis of much of the law since that opinion was rendered, appears from Knowlton v. Moore to have believed the case of U. S. v. Perkins to be sound.

The practice of writing brief opinions which is supported by the continued and vigorous expressions of representative members of the bar through the American Bar Association is a practice which deserves encouragement, but there has never been any representative movement on the part of the bar in favor of the practice of abbreviating to the point of delivering conclusions without reasoning upon important controverted questions, as to which the bar of the country is constantly called upon to advise. It is probably safe to say that many members of the bar throughout the country were not merely surprised, but were startled, at the fact that no reasoned opinion was rendered by the majority of the court in the prohibition case and they wondered how far the practice of the court was likely to develop in this direction in accordance with the well-known suggestion of Lord Mansfield to the colonial judge that he should state his decisions, but not to give his reasons.

It is submitted that the bar, which is expected to advise in regard to these complicated tax decisions and the officials, who are expected to apply the decisions of the courts and the provisions of the statutes, and the federal judges generally are entitled to a clearer statement from the Supreme Court of the United States upon so important a matter of practical administration, than is presented by the closing paragraph of the opinion quoted from New York Trust Co. et al v. Eisner when it is compared with U. S. v. Perkins and Snyder v. Betman and the cases in the lower federal courts decided on the strength of U. S. v. Perkins. Is not the dissenting opinion of Mr. Justice White in Snyder v. Betman a sounder opinion? In view of the varying statements in opinions, it is natural enough that administrative officials should claim that the New York tax was a tax on the right of transmission of the testator for some purposes and a tax on the right of the beneficiary to receive for some other purposes, and perhaps not a tax at all, but merely a separation of something from the estate for some other purposes as was claimed by the government in connection with the question of allowing the deduction of an estate tax from the income in the income tax return of an estate before the decision in the Woodward case.

F. W. GRINNELL.

Boston, Mass., July 25, 1921.

"The Language of the Law"

Edinburgh, July 13.—To the Editor: I have read with great interest the article in the June number on "The Language of the Law," by Mr. Lavery, in which towards the end he quotes a passage from Quintillian, in which that author advises "let no one therefore despise as inconsiderable the elements of grammar;" and Mr. Lavery proceeds "is not this as true now? and yet how many lawyers ever concern themselves with these "little things?" How many lawyers ever stop to parse a sentence?"

With this preface perhaps I may be allowed to draw attention to the immediately preceding passage of Mr. Lavery's article, where he writes, "the words are quoted from Quintillian, the greatest of Latin rhetoricians, he whom the Romans called the supreme controller of the restless youth." In that passage the word "he" incites two entirely separate questions—whether the word is not (1) ungrammatical, and (2) unnecessary. Yours faithfully, JOHN BURNS, W. S.

4 Wemyss Place.

Reply

Chicago, Aug. 3.—To the Editor: Referring to the letter you enclose from John Burns, W. S., of Edinburgh, Scotland, the questions which he raises seem to be open ones. It is quite true that under the general rule a pronoun agrees in case with its antecedent. But the unpleasant combination of sounds resulting if the words "him whom" are used, makes the ear instinctively prefer the nominative form "he." Certainly the use of this pronoun is a common one. It is equally certain that the nominative case has considerable authority, as is shown by the following quotations:

> This Lord Jesus Christ . . . we own and believe in; he whom the high priests raged against.
> (George Fox.)

> Yet I supposed it necessary to send you Epaphroditus, my brother, and companion in labor . . . he that ministered to my wants.
> (Philippians, II, 25.)

> The word came, not to Esau, the hunter, that stayed not at home; but to Jacob, the plain-man, he that dwelt in tents. (William Penn.)

> Now, therefore, come thou, let us make a covenant, I and thou. (Genesis, XXXI, 44.)

Finally, in regard to such questions may one not adopt the rule laid down by Professor Quiller-Couch in his essay on "Style"?—

"Literature is personal and men various—and even the Oxford English Dictionary is no Canonical book." Yours very sincerely, URBAN A. LAVERY.

A Decided Help

Ashland, Wis., July 29.—To the Editor: I have just read my July Journal, and I cannot refrain from congratulating you.

I cannot say that each number is better than its predecessor, because I have enjoyed them all.

The numbers of the Journal have been not only a source of information, but an inspiration and a decided help. They are as refreshing to me after busy days in the office as a drink of cold spring water to the dusty traveler. A. T. PRAY.

Origin of Bar Associations

Des Moines, Iowa, July 26.—To the Editor: I have been particularly interested in two articles which appeared in your Journal recently. The first, the "Origin and Uses of Bar Associations" by Hon. Marvelle C. Webber of Vermont, and the other, "A Response" by Charles E. Searls of Putnam, Conn.

Mr. Webber gives some interesting facts concerning the origin of bar associations and some data as

to the comparatively recent associations organized in this country.

The controversy between these gentlemen is over priority of organization. While we are making history, I think we should get together all the available data from whatsoever sources possible, and where wrong impressions or misunderstandings are presented, they should be corrected. By this means, we will assemble valuable data, and your splendid Journal can give no better service than to invite other criticisms and corrections.

My contention is as to priority of date of organization of state associations. Mr. Webber gives the date of the organization of the Bar Association of the City of New York as 1870, which is correct, and he also gives the inference that the New York State Association was the first State Association but gives no date, which in fact was 1876. Mr. Searls is inclined to the belief that Connecticut has priority in date, which is true, as the Connecticut Bar Association was organized in 1875.

However, while we of the Mid-West do not care to attach to ourselves any vain glory, yet we cannot refrain from stating that Iowa's first State Bar Association was organized in the city of Des Moines, on May 27, 1874, and had a continuous existence and annual meetings until 1881. Judge T. M. Cooley gave a masterly address in 1875 upon the "Sources of Inspiration in Legal Pursuits." Subsequent meetings were favored with annual addresses by Judge J. M. Love, Judge John F. Dillon, Justice Samuel F. Miller, Judge George W. McCrary, Judge J. M. Woolworth and others. The second, third and fifth annual officially printed proceedings are in existence. A reprint of all the published and unpublished proceedings and addresses was made in 1912.

I believe the facts herein given will be of interest to many who are giving the matter consideration and hope this statement may appear in the next issue of the JOURNAL. A. J. SMALL, State Law Librarian.

Wisconsin Third State Bar Association

Madison, Wis., July 19.—To the Editor: I note that Mr. Webber, President of the Vermont Bar Association, in his article on "Origin and Uses of Bar Associations," in the June, 1921, number of the Journal, at page 299, makes the following statement:

> The second state to form a state bar association was Illinois, organized in 1877. Vermont was the 3rd state. Our state bar association was organized in November, 1878.

I beg to make a correction. Mr. Weber in his search evidentally overlooked the fact that the Wisconsin State Bar Association was organized and its first meeting was held at Madison, January 9, 1878. This would make Wisconsin the third state bar association to be organized, Vermont the fourth and Ohio the fifth, and so on down the line.

GILSON G. GLASIER, Sec. Wis. State Bar Ass'n.

Address is a Gem

Winston-Salem, N. C., Aug. 1.—To the Editor:—Permit me to congratulate you upon the publication of the address of the late Chief Justice White in the July issue. This is a gem. The JOURNAL is a great publication and I look forward to receiving every issue.

R. C. KELLY.

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